No. 294

No. 13,006

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JOHN T. FEY, Clerk

In the

United States Court of Appeals

For the Sixth Circuit

CLYDE EUGENE GARNER, AUDREY HART GARNER, HORACE G. TWITTY, OREN CLOUD FESMIRE, SAMMY JOE GARNER, EDD JOHN MAYO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Western District of Tennessee, Eastern Division

---

BRIEF AND APPENDIX OF APPELLANTS

JOE A. APPLEBY,
Lexington, Tennessee,
CARMACK MURCHISON,
Bond Building,
Jackson, Tennessee,
Attorneys for Appellants.

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EARL W. KRUSEN, Clerk

STATEMENT OF QUESTIONS INVOLVED

FIRST QUESTION: Did the District Court err in refusing and declining to give in charge to the jury Request No. 2, which was as follows:

> "The Court is permitting you to take to the jury room with you the indictment in this case but you are again instructed that the indictment itself is not evidence of the guilt of the accused persons."

The District Court answered "No". The appellants contend that the answer should be "Yes".

SECOND QUESTION: Was the Court correct in denying appellants' motion for a mistrial based upon the misconduct of counsel for the government in propounding questions to Oren Cloud Fesmire, without any basis therefor, as follows:

> "Q. Just prior to going on the stand, Mr. Fesmire, did any of the other defendants ask you to take the rap for them?
> "A. No, sir, never.
> "Q. Wouldn't do anything like that?
> "A. No, sir.
> "Q. Who is on your bond?
> "MR. MURCHISON: Now, I want to ask, if the Court please, for a mistrial on that. That is a baseless insinuation against these other defendants, and highly prejudicial to them to make that sort of a statement in the presence of this jury.
> "MR. JOYNER: That is about the same—
> "MR. MURCHISON: (Continuing) —And reflects upon every one of these defendants.
> "THE COURT: That is not grounds for a mistrial, Mr. Murchison. The District Attorney is within his rights to ask the question, and the witness denied it, and that ends it."

(Note: The question above with respect to the bond is immaterial and out of its proper context. The objection and ruling thereon was with respect to the preceding questions.)

The District Court answered "Yes". The appellants contend that the answer should be "No".

THIRD QUESTION: Was the Court correct in denying appellants' motion for a mistrial, based upon the misconduct of the government's principal witness, Ralph Lumpkins, who is in charge of the Jackson office of the Alcohol and Tobacco Tax Division, U. S. Treasury, in testifying in the presence and hearing of the jury, concerning the following subject matter, which was known and admitted to be inadmissible testimony:

> "A. * * *. And when they went down the road, they went right by this house where we found seventeen and a half gallons of whiskey down there, and turned around and came back.
>
> * * *
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> "MR. HODGES: * * *. Mr. Lumpkins here did not realize what I was asking him. I asked him not to tell about the seventeen and a half gallons because we admit that that is not connected up with these defendants, and we agree that the jury should not consider that.
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> "MR. MURCHISON: He made the inquiry twice."

(Note: He had just previously testified to this objectional matter and had been admonished by government's counsel not to "tell about it". After the repetition of it the Court did instruct the jury to disregard it. The appel-

lants were not connected with this liquor, as the government conceded, when it was first testified to by Lumpkins. His repetition of it was plainly misconduct.)

The District Court answered "Yes". The appellants contend that the answer should be "No".

FOURTH QUESTION: Was the Court correct in denying appellants' motion for a mistrial based upon the false testimony of Ralph Lumpkins, agent in charge of the Jackson office of the Alcohol and Tobacco Tax Unit, Treasury Department, wherein he first testified positively and repeatedly that he was searching for the appellant, Horace Twitty, and had in his possession a warrant for his arrest on a charge of conspiracy to violate the Internal Revenue Laws, but subsequently admitted, on cross-examination, that he had no such warrant but had been notified that "there was a bench warrant out for his arrest".

The District Court answered "Yes". The appellants contend that the answer should be "No".

FIFTH QUESTION: Did the Court err in admitting the testimony relating to the finding of 63½ gallons of intoxicating liquor found at a distance variously estimated to be from 150 yards to 417 yards from the Garner home, where there was no evidence to connect the whiskey with any of the appellants, except possibly the Garners, and no evidence that it was the product of any conspiratorial operation.

The District Court answered "No". The appellants contend that the answer should be "Yes".

SIXTH QUESTION: Did the Court err in declining to withdraw from the jury the testimony relating to intoxi-

cants found on the premises of the defendant, Oren Cloud Fesmire, for the possession of which he had been previously convicted and which was not connected with any of the other defendants in this case.

The District Court answered "No". The appellants contend that the answer should be "Yes".

SEVENTH QUESTION: Did the Court err in refusing to withdraw from the jury the evidence relating to distilling operations conducted in the Bath Springs community of Decatur County, Tennessee, when, from all the proof, this operation appeared to be a separate and distinct conspiracy from the one described in the indictment and with respect to which four of appellants are not shown to have had any knowledge or connection whatever.

The District Court answered "No". The appellants contend that the answer should be "Yes".

EIGHTH QUESTION: Did the Court err in refusing to withdraw from the jury the evidence relating to intoxicating liquor found in the home of one John Warren (not a defendant), on the mere circumstances that the liquor appeared to have been delivered by Horace G. Twitty, appellant; otherwise, not connected with any of the other appellants or shown to have been connected with the alleged conspiracy.

The District Court answered "No". The appellants contend that the answer should be "Yes".

NINTH QUESTION: Did the Court err in refusing to withdraw from the jury the evidence with respect to the finding of two stills on the farm of Roy Bailey (a government witness) when none of the appellants were shown

to have had any connection with the stills except Clyde Eugene Garner, and his only alleged connection was the fact that Roy Bailey had testified that Garner had once asked his permission to place a still on his place (denied by Garner).

The District Court answered "No". The appellants contend that the answer should be "Yes".

TENTH QUESTION: Did the Court err in refusing to withdraw from the jury the evidence relating to stills found on TVA land where the only evidence of any connection between appellants and the still was a *joking* remark of Clyde Eugene Garner to a Tennessee Highway Patrolman (R. B. Blasingame, a government witness who testified that he understood the remark of Garner's to have been "*just joking*") that he placed the still on TVA land in the belief that it was the property of another person.

The District Court answered "No". The appellants contend that the answer should be "Yes".

ELEVENTH QUESTION: Did the Court err in receiving in evidence, over the objections of appellants, and subsequently in refusing to withdraw from the jury the evidence relating to the purchase of sugar on August 9, 1954, which was *prior* to the date of the alleged conspiracy.

The District Court answered "No". The appellants contend that the answer should be "Yes".

TWELFTH QUESTION: Did the Court err in receiving evidence, over objections of appellants, relating to the value and amount of property belonging to the appellants, Clyde Garner and Audrey Garner, especially since

the same was wholly unconnected with the other appellants.

The District Court answered "No". The appellants contend that the answer should be "Yes".

THIRTEENTH QUESTION: Did the Court err in denying appellants' motion for a mistrial based upon the misconduct of counsel for the government in making the statement in the presence and hearing of the jury, without any basis therefor (or any attempt to prove it) that,

> "MR. HODGES: Your honor, we are claiming surprise here. We believe this man has been paid money to say he was beaten, and we want to show the truth of the matter, that is, he was acting in fear of Clyde Garner, and that is the reason he moved, and he told officers that is the reason he did move."

The District Court answered "No". The appellants contend that the answer should be "Yes".

FOURTEENTH QUESTION: Did the Court err in denying the motion for judgment of acquittal, or in the alternative, for a new trial, based upon the grounds enumerated in the foregoing questions; and including, also, a further allegation of misconduct on the part of Counsel for the government in cross-examining the appellant, Clyde Eugene Garner, with respect to his acquaintance with one Rothschild and one Bill Pegram, at least one of whom had been a participant in a criminal case tried in the State of Mississippi, *Bill Pegram* v. *State*, 78 So 2d 153. No basis whatever was shown for such a cross-examination.

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In the

UNITED STATES COURT OF APPEALS

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No. 13,006

CLYDE EUGENE GARNER, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

STATEMENT OF FACTS

(a) NATURE OF THE CASE

This is a criminal case. The indictment charged a conspiracy to violate the internal revenue laws of the United States with respect to the manufacture, transportation and sale of intoxicating liquors. It was tried in the District Court of the United States, Western District of Tennessee, Eastern Division, commencing on May 30, 1956, and concluding on June 1, 1956.

THE INDICTMENT: The indictment in this case was returned at the March Term of the United States District Court for the Western District of Tennessee, Eastern Division at Jackson. The persons named and indicted were Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Hood

Luther, Henry Laverne Nix, James Reves and Edd John Mayo. Six of these defendants entered pleas of not guilty and went to trial. They were as follows: Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo. The defendants Hood Luther, Henry Laverne Nix and James George Reves entered pleas of guilty. The first two named were sentenced at Memphis and the latter, James George Reves, sentenced at Jackson.

VERDICTS AND SENTENCES: The six defendants were each found guilty by the jury and were immediately sentenced by the court.

Clyde Eugene Garner was sentenced to the custody of the attorney general for a period of three and a half years, and assessed a $10,000.00 fine.

Audrey Hart Garner was sentenced to the custody of the attorney general for a period of eighteen months and assessed a fine of $5,000.00.

Sammy Joe Garner was sentenced to the custody of the attorney general for a period of eighteen months.

Horace G. Twitty was sentenced for a period of three and a half years.

Oren Cloud Fesmire was sentenced for a period of eighteen months.

Edd John Mayo was sentenced for a period of one year.

James George Reves, (who entered a plea of guilty) was sentenced for a period of seven months.

The court recommended a penitentiary type institution for Clyde Garner and Horace G. Twitty, an institution for female offenders for Audrey Garner, a prison camp for Fesmire and Mayo and a reformatory for Sammy Garner.

MOTIONS DURING TRIAL: During the progress of the trial of this case the appellants seasonably made their motions for a mistrial, a judgment of acquittal and for the withdrawal from the jury of certain testimony which they felt had been improper and illegally admitted in evidence. The motions for a mistrial and for a judgment of acquittal were overruled by the district judge but the motion to withdraw evidence was allowed in part by the court and overruled with respect to other portions.

BAIL: The appellants have been admitted to bail.

NOTICE OF APPEAL: A notice of appeal was given within ten days after the entry of judgment or order overruling their motion for a new trial and for judgment of acquittal.

DOCKETING OF CASE: This case was filed in the United States Court of Appeals, Sixth Circuit, on September 24, 1956 and within the time allowed by an extension order granted by the district judge therefor.

SUMMARY OF EVIDENCE

The transcript of the evidence in this case is voluminous and, therefore, it is difficult to set forth in a clear, concise and chronological manner a statement of all of the relevant facts of the case.

Briefly the evidence shows that numerous illicit distilleries were located in the counties of Henderson, Chester and Decatur, in the State of Tennessee during the period covered by the dates mentioned in the indictment. There is evidence of large purchases of sugar, charcoal, and other ingredients commonly used in the manufacture of whiskey.

There was some evidence of the purchase of bran and lumber, presumably also used in the construction of stills and in the manufacture of liquor. The evidence further reveals the discovery, at different times and places of whiskey caches, principally located in Henderson County, Tennessee.

It appears that during the period of the alleged conspiracy certain stills were operated in the community known as Bath Springs, Decatur County, Tennessee, by the defendants (not appellants) Hood Luther, Henry Laverne Nix and George Reves, all of whom entered pleas of guilty.

There was some evidence that two or more stills were found on lands belonging to the Tennessee Valley Authority in Decatur County, Tennessee, but nothing to connect any of these appellants with the operation of them except some remarks made by the appellant, Clyde Eugene Garner, to R. B. Blasingame, a Tennessee Highway Patrolman, which the undisputed evidence shows to have been made as a *joke*.

The evidence shows that, at a considerable distance from the home of the appellants, Clyde Garner and Audrey Garner, a quantity of illicit whiskey was found in a cache. The appellant, Oren Cloud Fesmire, had been convicted of the illegal possession of whiskey, prior to his indictment in this conspiracy, and the whiskey which he was charged with having illegally possessed, and which forms the basis of his prior conviction, was also shown in evidence in this case.

There was, as heretofore stated, evidence of the purchase of large quantities of sugar from certain wholesale and retail grocery firms in Lexington, Tennessee, but the evidence is in dispute as to the identity of the purchasers. On two separate occasions the loads of sugar, of about a ton each were apprehended near the premises of the Garners.

There was no record evidence of any agreement or conspiracy shown. The evidence of conspiracy was wholly circumstantial and involved, in our judgment, more than one conspiracy, if, indeed, there was any conspiracy involved in the case.

Since a more complete discussion of the evidence will be given in the argument with respect to the various questions of law which have arisen in this case, we feel that a further discussion of the facts, at this point, to be unnecessary.

FIRST QUESTION: Did the District Court err in refusing and declining to give in charge to the jury Request No. 2, which was as follows:

> **"The Court is permitting you to take to the jury room with you the indictment in this case but you are again instructed that the indictment itself is not evidence of the guilt of the accused persons."**

The District Court answered "No". The appellants contend that the answer should be "Yes".

An examination of the entire charge given by the district court to the jury in this case discloses that the jury were told that the indictment was merely a means of bringing the defendants before the court for trial. The language was as follows:

> "THE COURT: Gentlemen of the jury, the indictment in this case, which, as you understand, I am sure, is a means only by which the defendants are brought before this court and this jury for trial, charges the defendants, and each of them entered into a conspiracy to violate certain internal revenue statutes of the United States, and, in pursuance thereof, and as a means of carrying out the same, one or more of the defendants committed certain overt acts to effect the

objects and purposes of the conspiracy. The indictment, which is a rather lengthy one, will be furnished you in the jury room for your convenience."

It is to be here noted that the court did *not* give in its charge the very essence of the requested instruction. It is the insistence of the appellants that the court should have instructed the jury, in addition to what was given, that "the indictment itself *is not evidence* of the guilt of the accused persons."

This matter was called specifically to the attention of the court, as appears from the colloquy between the court and counsel for the appellants. Appx. p. 135a. Moreover, the court gave a copy of the indictment to the jury when it retired to consider of its verdict.

The failure of the court to grant this request was a fatal and reversible error. The Circuit Court of Appeals for the Third Circuit, in *U. S.* v. *Schanerman*, 150 Fed. (2d) 941, 945, 946 specifically held that it was the duty of the district court, when requested to do so, to charge the jury in clear, unmistakable words that *the finding of an indictment is no evidence of the guilt of the accused*. We quote from the opinion in that case:

> "We come now to the serious question in the case. Did the district court commit reversible error in refusing defendant's first requested special instruction? The submitted instruction was in the following language:
>
> "'You are instructed that the indictment is a mere charge or accusation against the defendant, and is not any evidence of his guilt, and no juror in this case should permit himself or herself to be, to any extent, influenced against the defendant because of, or on account of the indictment. An indictment is merely the means of bringing a defendant to trial.'
>
> * * *

"Immediately before the jurors retired to deliberate upon their verdict, the court told them what exhibits they might have for examination in the jury room and added that 'the indictment may go to their room so they can read it and familiarize themselves with the charge.' This procedure fell within his sound discretion, but when the indictment and exhibits in a criminal case are taken to the jury room, the jury should be charged, upon request, that the indictment is not evidence of the facts charged therein. Little v. United States, 10 Cir., 73 F 2d 861, 864, 96 ALR 889."

"When requested so to do, as in the instant case, the district court, in clear, unmistakable words, should have charged the jury that the finding of an indictment is no evidence of the guilt of the accused."

The foregoing extract from the opinion of the court clearly sets forth the duty of the trial judge and, so far as we have been able to discover, is the settled law with respect to this matter. It would have presented no prejudicial matter to the Government's case and would have afforded to the appellants a fair trial to which they were entitled for the court to have given this instruction. The trial court had before him and could have easily ascertained and did ascertain that he had failed to comply with this rule.

Counsel for the appellants was, at the time, uncertain as to whether the court had given this matter in its instruction, when the colloquy between the court and counsel commenced, but afterwards ascertained that it had not been given as reflected by the following observation of counsel for the appellant:

"MR. MURCHISON: Yes, sir. The basis of our exception is that the jury should be positively instructed that the indictment and its allegations are not evidence of the matters relating thereto, and the fact that we do not believe the previous instruction sufficient to cover this question in view of the fact that the indictment is to be carried by the jury into the jury room."

The requested instruction appears in the appendix at page 135a.

It will be observed that in the requested instruction there appears the adverb, "again". Lest this may lead to some misunderstanding upon the part of the Court as to the exact reason for the presence of this word in the request, we feel that some explanation should here be made. Of course, the appellants were not entitled to have this instruction given if it had been merely a duplication of a previous instruction. The presence of this word, "again", in the special request was brought about as the result of a colloquy between the court and counsel for the appellants. In the course of this colloquy the trial court made the following specific statement:

> "THE COURT: Well I have told them that it was, already."

At this stage of the proceedings counsel were uncertain, in face of the trial court's statement, that they were correct in requesting the instruction. Out of an abundance of precaution, counsel framed the special request in the language in which it finally appeared containing the word "again". It developed however that the court had not given the substance of the requested instruction. Whereupon, the court made the following observation:

> "THE COURT: Well, the Court did charge the jury that the indictment is only a means by which they are brought before the court and a jury for trial.
>
> "Is that all?
>
> "MR. MURCHISON: I will note an exception there, Your Honor."

It will thus be observed that at this stage of the proceedings the district court well understood that the jury had not been instructed that an indictment was not to be

considered as evidence against the defendants. The court's final denial of this request was not predicated upon the assumption that it had been fully given in the charge. The presence of the word "again" in the request, while unfortunate, did not afford the trial court a basis for believing that the instruction had been given to the jury in its charge. The whole matter was further discussed between the court and counsel as appears from the following colloquy, out of the presence and hearing of the jury:

"THE COURT: Come around, the.

(The following occurred at the bench and out of the presence and hearing of the jury:)

"MR. APPLEBY: Let me see, then. I think I remember that, if Your Honor please.

"MR. MURCHISON: The courts have held it was absolutely error if the jury is not informed—

"MR. APPLEBY: I remember the Court charged it was only a means of bringing the defendant—

"THE COURT: *Here it is, right here.*

"MR. MURCHISON: We will note an exception on that anyway, because I want to get that clear.

"THE COURT: State your reasons, then, into the record for your exceptions to the Court's refusal on that special request, if you will. The rules require that, I believe.

"MR. MURCHISON: Yes, sir. The basis of our exception is that the jury should be positively instructed that the indictment and its allegations are not evidence of the matters relating thereto, and the fact that we do not believe the previous instructions sufficient to cover this question, in view of the fact that the indictment is to be carried by the jury to the jury room. (Appx. p. 135a)

"The said Special Request is as follows:
"Defendants' Request No. 2
Refused — Boyd.

"The Court is permitting you to take to the jury room with you the indictment in this case but you are again instructed that the indictment itself is not evidence of the guilt of the accused person."

By a clerical inadvertance the word "again" was not stricken out as it should have been at the conclusion of the court's consideration of the request, although both the Court and counsel had finally determined that the requested instruction had not been given.

SECOND QUESTION

The Second question presented in this case is that arising from the misconduct of counsel for the Government in propounding questions to Oren Cloud Fesmire, imputing that he had been procured by the other appellants to "take the rap" for them.

The law on this subject has been clearly and cogently stated in *Wigmore on Evidence*, Vol. 6 sec. 1808(2):

"The same principle governs the *putting of questions to witnesses*. The jury may under certain circumstances obtain an impression from the mere putting of illegal questions which they either answered in the negative or are not answered because illegal and excluded, that there is some basis to the truth for the question. When counsel puts such a question, believing that it will be excluded for illegality or will be negatived, and also having no reason to believe that there is a foundation of truth in it, he violates professional honor. It is generally agreed that where counsel has been warned by a prior successful objection of the opponent to similar evidence, that it

is illegal, he will be prevented from again putting questions dealing with the class of facts affected by the same illegality." (Italics ours)

The exact language of counsel for the Government, the answers of the witness, and the objection made thereto as reflected in the record, is as follows:

"Q. Just prior to going on the stand, Mr. Fesmire, did any of the other defendants ask you here in effect to take the rap for them?

"A. No, sir, never.

"Q. Wouldn't do anything like that?

"A. No, sir.

"Q. Who is on your bond?

"MR. MURCHISON: Now, I want to ask, if the Court please, for a mistrial on that. That is a baseless insinuation against these other defendants, and highly prejudicial to them to make that sort of a statement in the presence of the jury.

"MR. JOYNER: That is about the same—

"MR. MURCHISON: (Continuing) — And reflects upon every one of these defendants.

"THE COURT: That is not grounds for a mistrial, Mr. Murchison. The District Attorney is within his rights to ask the question, and the witness denied it, and that ends it." (Appx. p. 100a)

It will be observed that a question relating to the bond made by the defendants appears in the foregoing colloquy to have been propounded before counsel for the defendants had opportunity to make their objections. But the objection is clear. It was made to the questions relating to the defendants having induced the witness to take the "rap" for them. The ruling of the trial court was directed to that precise point and no other. The trial court specifically held that counsel for the Government had a right to ask the question but that the answer of the witness ended the inquiry.

The trial court was plainly in error in this ruling. The United States Court of Appeals, District of Columbia Circuit, in *Lee Won Sing* v. *United States*, 215 Fed. 2d 680, in a similar situation, held such questioning constituted reversible error. Its observations were as follows:

> "The subject matter of the question of course was highly relevant, having to do with the conduct of appellant and with bribery and perhaps perjury affecting Lee Poo's testimony. But it could not properly be asked unless the prosecution had evidence of or reasonable ground to believe the truth of its implications: New York Life Ins. Co. v. Rankin, 8th Cir., 162 Fed. 103, 109; Clement v. State, 69 Tex Cir., R. 369, 153 SW 1137; 6 Wigmore, Evidence, Sec. 1808 (2) (3d ed). And see Vallone v. State, 141 Tex. Cir. R. 220, 226, 228, 147 SW 2d, 227, 229, 231. Since no effort was made to prove its truth, after Lee Poo's denial, the propriety of the question had to depend upon the existence of reasonable grounds. All we have on this is that after the jury retired Government counsel at a bench conference advised the court of an anonymous letter in the hands of the police 'from some Chinaman or somebody to the effect that appellant gave Lee Poo $20,000.00 to take the blame, and also said there were like rumors'. This, without at least some showing of an investigation and its result is not enough, particularly in view of the highly prejudicial character of the question.
>
> "The general instruction given by the court did not remedy the particular problem. The damaging character of the question, considered with the inconclusiveness of the evidence of appellant's guilt, called for a more direct and positive elimination of its influence upon the jury, when request for some instruction to that end was made. For this reason the judgment will be reversed and a new trial awarded."

THIRD QUESTION

The Third Question which we have assigned as error relates to the misconduct of the principal Government witness, Ralph Lumpkin, Agent in Charge of the Jackson Office of the Alcohol and Tobacco Tax Division, U. S. Treasury Department.

Mr. Lumpkin testified that seventeen and one-half gallons of whiskey had been found in the neighborhood of the Y-Inn in Chester County, Tennesseee. Although it was expressly admitted by Government's counsel that there was no connection between this whiskey and the appellants and in spite of the fact that Mr. Lumpkin was requested not to go into this matter, Mr. Lumpkin did, in response to another question, which permitted such an answer, again relate in court and in the presence of the jury the facts relating to the discovery of this seventeen and one-half gallons of whiskey; and he did so in a manner, and under such circumstances, that the jury necessarily was prejudiced against the appellants as the result of the context in which the testimony was given. He had stated, without having checked the title, that this whiskey was found in a building owned by the appellant, Clyde Garner. There was absolutely no proof of this and the effort to inject it into the evidence by Mr. Lumpkin appears to have been a calculated effort, on his part, to prejudice the appellants by making the unwarranted statement, and subsequently repeating it, that seventeen and one-half gallons of whiskey was found down there in a house belonging to Clyde Garner of which there was no evidence. It is respectfully submitted that, although this misconduct was committed by a Government agent and witness rather than a person strictly a Court official, it was misconduct of the type that warranted a mistrial and the Court should have granted it. (Appx. pp. 43a-44a.)

FOURTH QUESTION

The Fourth Question relates also to the action of the Court in denying a mistrial to the appellants based upon testimony given by the aforesaid Ralph Lumpkin, Agent in Charge of the Jackson Office of the Alcohol and Tobacco Tax Division, U. S. Treasury.

This witness completely overstepped the bounds of propriety and truthfulness, when he testified, more than once, that he had a warrant for the arrest of the appellant, Horace G. Twitty, on a charge of conspiracy to violate the Internal Revenue Laws when he searched a certain building located on the premises of the appellants, Clyde and Audrey Garner. To be sure, on cross-examination Mr. Lumpkin admitted that he had no such warrant and that his information with respect to these charges were merely hearsay. But no attempt was made upon the part of the Government or the Court to adequately clear this matter up before the jury. Neither was this witness admonished about making such statements before the jury. (Appx. pp. 34a, 35a, 47a).

The effect of this testimony of the Government's witness, Ralph Lumpkin, was to bring before the jury, as a part of the Government's evidence in chief, the fact that an accusation of crime was pending against the appellant Horace G. Twitty. It is well settled that no inquiry may be made with respect to collateral crimes. *Johnson* v. *U. S.*, 318 U. S., 189, 87 L. Ed. 704; *Eley* v. *U. S.* 6th Cir., 117 Fed. 2d, 526.

Evidence of this type would not be permitted under the rulings of the Sixth Circuit, even on cross-examination and for impeachment purposes. Mere accusations of crime may not be shown for any purpose. *Pearson* v. *U. S.*, 6 Cir. 192 Fed. 2d, 681.

FIFTH QUESTION

The Fifth Question relates to the action of the Court in admitting in evidence testimony with respect to the finding of sixty-three and one-half gallons of intoxicating liquor in a cache variously estimated to be from one hundred fifty yards to four hundred seventeen yards from the home of the Garners. (Appx. pp. 29a-30a, 33a).

Of course evidence should be withdrawn from the jury which is not relevant to any issue and the single issue in this case was whether or not the appellants were guilty of the conspiracy with which they were charged in the one count indictment in this case. It is our contention that the mere finding of liquor, under circumstances which might conceivably connect it with either one of the appellants, is irrelevant to any of the issues in this case. At this juncture we wish to point out to the Court that it is our contention that the various items of evidence, indicating illegal liquor transactions, constitute but a series of smaller offenses wholly unrelated to one another and that there was no evidence of a single "all-inclusive conspiracy" as the trial Court denominated it.

SIXTH QUESTION

The Sixth Question relates to the reception in evidence of the testimony of the various witnesses with respect to intoxicating liquors found on the premises of the appellant, Oren Cloud Fesmire. Fesmire had previously entered a plea of guilty with respect to this identical possession charge and had served a sentence. He testified that the whiskey belonged to him and that none of the defendants were connected with it in any manner whatsoever. His testimony was undisputed. For the same reasons adduced under our consideration of the Fifth Question we submit that this evi-

dence should have been withdrawn from the jury. It was simply an isolated violation of the Internal Revenue Laws by the appellant, Oren Cloud Fesmire, and in no way a part of any conspiracy or alleged conspiracy.

SEVENTH QUESTION

The Seventh Question relates to the evidence received and heard by the jury with respect to the illicit distilleries near Bath Springs, Decatur County, Tennessee. It is our insistence that this transaction constituted a separate and distinct conspiracy engaged in by the defendants Hood Luther, Henry Laverne Nix and George Reves who entered their several pleas of guilty. The fact that two of the appellants, Clyde Garner and Horace Twitty, may have been in some manner connected with these operations, although the facts are in sharp dispute, do not oppose our view of the matter. It is beyond question, from a consideration of all of the evidence whether disputed or not, that the appellants Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo and Audrey Hart Garner had no connection with this Bath Springs operation and in fact knew nothing about it so far as the record shows. (Appx. 14a-16a). Had they been indicted, jointly with Luther, Nix and Reves, in connection with the operation of this still, as principals, and for the substantive offense, a judgment of acquittal would have been entered because there would have been no evidence for the jury to pass on so far as they were concerned.

In the case of *Berger* v. *U. S.*, 295 U. S., 79, 79 L. ed. 1314 the Court declared, in effect, that the reception in evidence of testimony relating to a conspiracy, separate and distinct from the conspiracy charged in the indictment, might be prejudicial to the defendants in a conspiracy case. Subsequently in *Kotteakos* v. *U. S.*, 328 U. S., 750, 90 L. ed. 1557,

the Court seems to have modified this view to the extent of holding prejudicial, as a matter of law, evidence of other conspiracies than that charged in the indictment. In a still later case, *Blumenthal* v. *U. S.*, 332 U. S., 539, 92 L. ed. 154, the Government, in its brief (as reflected in a footnote to the opinion) conceded that if there were proof of other conspiracies the verdict could not stand in the case. In the latter case the Government contended that the activities did not constitute a separate conspiracy but that the evidence showed one over-all conspiracy.

An examination of the evidence in this case shows nothing more than that three, or possibly five, of the named defendants were engaged in the illegal manufacture of liquor near Bath Springs, Tennessee. (Appx. pp. 19a-23a). With the termination of the operations at this place, the defendants Hood Luther, Henry Laverne Nix and George Reves pass out of the picture. Of course, as heretofore stated, they have entered their pleas of guilty in this case but we do not concede that they were guilty of the *particular* conspiracy alleged in the indictment.

On the other hand, the appellants, Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo and Audrey Hart Garner do not appear in any manner to have been involved in the Bath Springs operation. The presence of a single alleged conspirator in the several conspiracies proven does not, under the ruling in the Kotteakos case, necessarily result in a finding of the fact that only one conspiracy existed, as the Court in there carefully pointed out.

EIGHTH QUESTION

The Eighth Question relates to the action of the Court in refusing to withdraw from the jury the evidence relating to the discovery of intoxicating liquor in the home of one John Warren who lived in Gibson County, Tennessee. John

Warren was not one of the defendants on trial or named in the indictment. It is not claimed that he was one of the conspirators.

Capt. N. A. Robison of the Tennessee Highway Patrol testified that he went to the residence of John Warren who lived two or three miles from Humboldt, Tennessee, on a gravel road. He saw the appellant, Horace G. Twitty, talked to John Warren at a place about two hundred yards south of Warren's home. Twitty and Warren were seated in a Pontiac automobile. Nearby was a 1947 model, black Ford bearing a license plate with the number 57-452 on it. There were indications in the rear of the Ford automobile that whiskey had recently been transported in it. Captain Robison and his agents seized the Ford automobile but it was subsequently returned to the appellant, Horace G. Twitty. This investigation was made on April 14, 1955. Captain Robison claimed that the Ford automobile was the same one that he later saw, on August 13, 1955, at Bath Springs. (Appx., pp. 87a-88a, 90a).

We here point out that while this automobile may be connected with the Bath Springs operation, it was not in any sense a part of the conspiracy for which these appellants have been indicted. Indeed, since it was apprehended some four months *before* the discovery of the Bath Springs distilleries, it is not shown that this automobile was connected with any of the conspiracies. The appellant, Horace G. Twitty, was shown to have been using the automobile but there was no evidence that in April of 1955, he was connected with any conspiracy, — at least not with the conspiracy to operate the stills found at Bath Springs.

It is submitted that this illegal act was simply an isolated transaction and irrelevant to the issues in this case and that the Court should have excluded all the evidence relating to the seizure of the whiskey and the Ford automobile on April 14, 1955, in Gibson County, Tennessee.

NINTH QUESTION

The Ninth Question relates to the action of the Court in refusing to withdraw from the jury the testimony given upon the trial of this case by Roy Bailey.

Roy Bailey testified for the Government, stating that he was once approached by the appellant, Clyde Eugene Garner, and permission requested of him by the latter to place stills upon his farm. He testified that he declined to give such permission but that he subsequently found some stills located on his land; that he mentioned this subject to the appellant, Clyde Eugene Garner, telling the latter "if those were his stills he wanted him to move them off our place." Upon making this statement, Garner advised Bailey to "turn them in." And that is what Roy Bailey did. He testified that he did not know to whom the stills belonged and didn't know whether the stills were located on his premises when Garner spoke to him the first time about the subject. (Appx. pp. 80a-81a, 82a-83a).

To permit this evidence to be considered by the jury in determining the guilt of these appellants is to subject them to conviction upon a mere possibility. Of course, Clyde Eugene Garner denied any connection with these stills, but the prejudicial effect of the finding of these stills is apparent. Assuming Roy Bailey to have been a truthful person, there was evidence that Clyde Garner sought permission to locate stills on his lands, but that he actually did so, is without any foundation in the record in this case. It is purely conjectural as to how the stills came to be upon the farm of Roy Bailey and as to the identity of the owners of them. This type of evidence was highly prejudicial to the appellants for another reason: None of the other appellants were directly or indirectly connected with these stills. Bailey did not mention the name of any other person than that of Clyde

Garner as having discussed these stills with him. It is submitted that the trial court was in error in its failure to withdraw this evidence from the jury.

TENTH QUESTION

The Tenth Question relates to the action of the court in refusing to withdraw from the consideration of the jury the evidence relating to stills found on TVA land in Decatur County, Tennessee.

This situation here, as disclosed by the evidence in the case, is one of the most bizarre and extraordinary that we have ever encountered in a lawsuit.

The Government's only witness with respect to the above stills was R. B. Blasingame, a member of the Tennessee Highway Patrol. He testified that he met the appellant, Clyde Eugene Garner, in January 1955 at the Y-Inn, in Chester County, Tennessee; that he was dressed in his uniform as a member of the Tennessee Highway Patrol; that Garner knew he was a member of the Tennessee Highway Patrol; that they were talking at the Y-Inn, on this particular occasion and that Garner, without being questioned or placed under arrest, told him that he had put two 35-sack pots (stills) in Decatur County on somebody else's land; that it turned out to be TVA property and that someone had left a note indicating that they wanted the stills removed within ten days. (Appx. pp. 75a-76a, 78a-79a).

Now this information was not regarded by the officer, R. B. Blasingame, as a serious and actual account of any facts whatever. Mr. Blasingame stated "I thought he actually was just *joking*, and to my own knowledge I don't know yet, * * *".

On cross-examination Mr. Blasingame, without being pressed on this particular point, again voluntarily testified that, "I thought at the time he was just joking, and still

don't know whether he was, * * *". There was no evidence whatever to connect either Garner or the other appellants with the operation of these stills. Only the *joking* remark that Garner is alleged to have made to Blasingame exists as a basis for admitting this evidence. Manifestly, it was highly prejudicial to all of the appellants, including Clyde Eugene Garner himself, to have the juryconsider this evidence. It is quite unbelievable that the appellant, Clyde Eugene Garner, would have deliberately and wilfully related to a member of the Tennessee Highway Patrol his guilt of violating the laws of the United States relating to the Internal Revenue because such violations also are violations of the laws of the State of Tennessee which the Tennessee Highway Patrol consistently enforce.

ELEVENTH QUESTION

The Eleventh Question related to the action of the Court in receiving in evidence, over the objection of the appellants, and subsequently in refusing to withdraw from the jury evidence relating to the purchases of sugar prior to the date of the alleged conspiracy in this case. The indictment alleged that the conspiracy commenced on or about September 1, 1954. Without discussion, we submit that evidence of acts which occurred three weeks or more before the date of the alleged conspiracy were inadmissible against these appellants. We may add that it is not clear from the record to whom the sugar was sold or that it was sold to any of the appellants. The record shows that it was sold by the United Grocery Company to the Webb Grocery but does not indicate the identity of the person who finally received it. Clearly, this evidence should not have been received and its reception in evidence and consideration by the jury could have had no other effect than to prejudice their case. (Appx. p. 60a).

TWELFTH QUESTION

This question related to the action of the Court in receiving in evidence testimony relating to the value and extent of the property owned by the appellants Clyde Eugene Garner and Audrey Hart Garner. Unless it was the Government's purpose to show that these persons had accumulated large sums of money from their illegal liquor operations, we are at a loss to understand why this testimony was injected into the case. There was no proof that the lands which they then claimed to belong to them had been bought since the commencement of the conspiracy. The obvious purpose was to mislead the jury even if this was a proper subject of inquiry. Moreover, this type of evidence necessarily prejudiced the other appellants none of whom were shown to own any property of any consequence. There was no effort made to determine the encumbrances or transfers outstanding against the properties which Clyde Garner claimed that his wife owned. Such evidence shed no light upon the extent of their supposed liquor operations or the profits which they may have made. (Appx. pp. 120a-121a, 122a).

This evidence should have been excluded, when objected to, and in any event should have been withdrawn on motion of the appellants. The court declined to take this action and we feel that the appellants have been greatly prejudiced thereby.

THIRTEENTH QUESTION

The Thirteenth Question relates to the action of the court in denying to the appellants a mistrial based upon the misconduct of counsel for the Government in making the statement, in the presence and hearing of the jury, without any basis therefor, (or any attempt to prove it), that,

"MR. HODGES: Your Honor, we are claiming surprise here. We believe this man has been paid money to say he was beaten, and we want to show the truth of the matter, that is, he was acting in fear of Clyde Garner, and that is the reason he moved, he told officers that is the reason he did move."

This is such a manifest error that we do not understand how the trial court could have disregarded it when he came to consider the motion for a mistrial in this case. Whether made in oral argument before the jury or otherwise, such conduct on the part of counsel for the Government has been many times clearly announced to be a forbidden practice and, in many instances, grounds for reversal.

(Note: Through an inadvertence, Mr. Hodges' remark has not been printed in the appendix. It appears on page 102 of the Transcript.)

The cases in support of our contention will be hereinafter cited.

FOURTEENTH QUESTION

The Fourteenth Question relates to the action of the court in denying the motion for judgment of acquittal or, in the alternative for a new trial, based upon the grounds enumerated therein, which includes a further, and additional ground, to-wit: the misconduct of government's counsel on the cross-examination of the appellant, Clyde Eugene Garner, with respect to his acquaintance and association with one Rothschild and one Bill Pegram. (Appx. pp. 122a-123a).

Counsel for the appellants were caught unawares, as naturally they would be, by this line of cross-examination on the part of counsel for the Government. The purpose of propounding these questions was not clear when the sub-

ject of the acquaintance of these appellans with Rothschild and Pegram was first inquired into by the Assistant United States Attorney. When it dawned upon counsel for the appellants that the questioning was simply an attempt to associate the appellants with persons of questionable reputation and character, objection was promptly made. There was no effort on the part of counsel for the Government to connect Rothschild or Pegram with the appellants herein or with the conspiracy for which they have been indicted. There was no explanation of this line of cross-extmination. We are, therefore, obliged not to go outside the record in discussing this phase of the case and cannot, therefore, disclose to the Court what we believe to have been the Government's purpose. However, this Court takes judicial notice of the published opinions of other appellate courts and it will judicially know that one of these persons, Bill Pegram, was one of the accused persons in the case of *Bill Pegram* v. *State*. (Miss) 78 So. 2d, 153. We have been unable to trace any evidence of which this Court will take judicial notice as to the identity of Rothschild. Certainly this Court will not be blind as to the real purpose of counsel for the Government in injecting the names of these persons into the cross-examination of the appellant, Clyde Eugene Garner. It was a deliberate attempt of trying to prove "guilt by association" and that only. Such an unfair method of prosecution should result in the reversal of this case. We know of no judicial precedent whereby counsel for the Government may sanction or excuse the use of such means to achieve a conviction. To subject the accused to a cross-examination with respect to matters of this type, for which they were wholly unprepared to defend themselves, is to deprive them of a fair trial and of due process of law.

CONCLUSION

There were committed upon the trial of this case so many errors of a highly prejudicial nature that only a reversal of the case will meet the requirements of justice. If only one error, or even two or three, had occurred during the progress of the trial of this case, it might have been one for the application of Rule 52 of the Federal Rules of Criminal Procedure, but such is not the case here.

The mere fact that these appellants, or some of them, may have been guilty of violations of the Internal Revenue Laws of the United States, affords no basis for a conviction on this conspiracy charge. The indictment is in *one count* only. It is a sweeping charge of conspiracy to violate the laws relating to the manufacture, possession, transportation and sale of intoxicating liquors. Conspiracy is the *essence* of the offense and not the guilt or innocence of the appellants with respect to any substantive violation, actual or claimed. A conspiracy is not to be inferred from the casual meeting of persons. *Dennert* v. *U. S.*, 6th Cir., 147 Fed. 2d, 286; *U. S.* v. *Di Re*, 332 U. S., 581, 92 L. ed. 210.

And it is clearly the law that a mere knowledge of the existence of a conspiracy is insufficient to sustain a conviction even where one has contributed supplies. *U. S.* v. *Falcone*, 311 U.S. 205, 85 L. ed. 128; *Moss* v. *U. S.*; 6th Cir., 132 Fed 2d. 875.

The Court of Appeals, Sixth Circuit, has repeatedly held irrelevant evidence prejudicial and sufficient to warrant reversal. *Giordano* v. *U. S.*, 185 Fed 2d. 524; *Brubaker* v. *U. S.*, 183 Fed 2d. 894. It is a plain violation of the rights of the accused for counsel for the Government to make improper statements, either on cross-examination or in the argument. *Berger* v. *U. S.*, *supra*; *Pharr* v. *U. S.*, 6th Cir., 48 Fed 2d. 767; *Ross* v. *U. S.*, 6th Cir., 180 Fed. 2d. 160. And, as we have heretofore shown, it was the plain

duty of the trial court to instruct the jury that the indictment returned in this case, which the jury carried with them into the jury room was not to be considered as evidence.

The appellants have not been accorded a fair and impartial trial. Misconduct permeates the record. They have been convicted on evidence which was irrelevant and prejudicial, compounded with the lawful and relevant evidence to the extent that their rights have been substantially affected.

Accordingly, we respectfully submit to the Court that the verdicts and judgments in this case should be set aside and the case reversed and remanded for a new trial.

Respectfully submitted,

JOE APPLEBY
Lexington, Tennessee
CARMACK MURCHISON
Bond Building
Jackson, Tennessee
Attorneys for Appellants.

In the

United States Court of Appeals

For the Sixth Circuit

CLYDE EUGENE GARNER, AUDREY HART GARNER, HORACE G. TWITTY, OREN CLOUD FESMIRE, SAMMY JOE GARNER, EDD JOHN MAYO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Western District of Tennessee, Eastern Division

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APPENDIX

JOE A. APPLEBY,
Lexington, Tennessee,
CARMACK MURCHISON,
Bond Building,
Jackson, Tennessee,
Attorneys for Appellants.

In the

UNITED STATES DISTRICT COURT

For The Western District of Tennessee
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff.

vs.

CLYDE EUGENE GARNER, ET AL.,
Defendants.

RELEVANT DOCKET ENTRIES

1. March 26, 1956 — Filed Indictment (one count).

8. March 27, 1956 — Filed Order Recording Pleas of Not Guilty and setting case as to Horace Twitty, Edd John Mayo, Clyde Garner, Audrey Hart Garner, Sammy Joe Garner and Oren Cloud Fesmire.

22. June 4, 1956 — Filed Judgment and Commitment for Clyde Eugene Garner — sentenced to 3½ years imprisonment on the one count indictment to commence on date to be fixed by Court following Motion for New Trial & Appeal— said motion to be heard at Memphis June 22, 1956 at 9:30 A.M. and in meanwhile present bond to stand — to pay a fine of $10,000.00 on the one ct. indictment — and in default of payment to be further imprisoned until paid or until otherwise discharged as provided by law — deft. given until June 8th to execute bond to secure fine

or execution will issue – Certified copies issued & handed Marshal.

24. June 4, 1956 – Filed Judgment & Commitment for Audrey H. Garner – sentenced to 18 months imprisonment on the indictment – to commence on a date to be fixed by Court following Motion for New Trial & Appeal – said Motion for New Trial set June 22, 1956 at Memphis – meantime to stand on present bond – to pay committed fine of $5,000.00 – given until June 8, 1956 – to execute supersedeas bond to secure fine or execution will issue – Certified copies issued and handed Marshal.

26. June 4, 1956 – Filed Judgment & Commitment for Horace G. Twitty – sentenced by Court to 3½ years imprisonment to commence on a date to be fixed by Court following Motion for New Trial & Appeal – said Motion set at Memphis June 22, 1956 – 9:30 A.M. – meantime present bond continued – Certified copies handed Marshal.

28. June 4, 1956 – Filed Judgment and Commitment for Oren Cloud Fesmire – deft. sentenced to 18 months imprisonment to commence on a date to be fixed by Court following Motion for New Trial and Appeal; said Motion set at Memphis, June 22, 1956 – at 9:30 A.M. – meantime present bond continued – Certified copies handed Marshal.

30. June 4, 1956 – Filed Judgment & Commitment for Sammy Joe Garner – sentenced to 18 months imprisonment to commence on a date to be fixed by the Court following Motion for New Trial & Appeal; said Motion set at Memphis June 22, 1956 – present bond to stand – Copies handed Marshal.

32. June 4, 1956 – Filed Judgment & Commitment for Mayo – sentenced to one year imprisonment to commence on a date to be fixed by the Court following Motion for New Trial & Appeal – Motion set at Memphis June 22, 1956 – present bond to Stand – Copies handed Marshal.

Relevant Docket Entries

33. June 6, 1956 – Filed Motion to set aside Verdict of Jury, for entry of Judgment of Acquittal – or, in the alternative, for a new trial.

42. June 27, 1956 – Filed Order Overruling Motion to set aside verdict of jury, for entry of Judgment of Acquittal, or, in the alternative, for a new trial and order resetting bond for Audrey Hart Garner.

43. June 29, 1956 – Filed Notice of Appeal.

44. July 19, 1956 – Filed Order Extending Time for Filing and Docketing Record on Appeal.

45. Sept. 11, 1956 – Filed Transcript of Evidence and Charge of the Court to the Jury (five volumes).

46. Sept. 11, 1956 – Filed Transcript of Portions of Proceedings on Motion for New Trial.

(CAPTION OMITTED)

INDICTMENT

The Grand Jury charges:

COUNT 1. (18-371)

That Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Hood Luther, Henry Laverne Nix, James George Reves and Edd John Mayo, all late of the Western District of Tennessee, and all of whom are hereby and herein indicted and named as co-conspirators and all of said persons who, being hereafter referred to as defendants, together with divers other persons, to wit:

On or about September 1, 1954, and continuously thereafter up to and including the date of this indictment, in

the Eastern Division of the Western District of Tennessee, and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly and feloniously conspire, confederate and agree among themselves and with each other and with divers other persons, whose names are to the grand jurors unknown, in violation of Section 371, Title 18, United States Code Annotated, to commit, in the manner and by the means and to the extent hereinafter shown, certain offenses against the laws of the United States and more specifically, Sections 2803 Internal Revenue Code 1939; 5008(b) Title 26, United States Code; 2913 Internal Revenue Code 1939; 5632 Title 26 United States Code; 2810 Internal Revenue Code 1939; 5174 Title 26 United States Code; 2833 Internal Revenue Code 1939; 5606 Title 26 United States Code; 2834, Internal Revenue Code 1939; 5216(a) Title 26 United States Code and 7302 Title 26 United States Code, all of said sections being laws of the United States in full force and effect at all times mentioned in this indictment, to wit:

I. To possess, transport, sell and transfer distilled spirits, the immediate containers of which did not have stamps affixed thereto denoting the quantities of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such spirits, the exact quantities and a more particular description of the distilled sipirts possessed, transported, sold and transferred and the places where the same were possessed, transported, sold and transferred, except as herein mentioned, being to the grand jurors unknown, said acts being then and there unlawful and contrary to the requirements of and in accordance with the provisions of Section 2803, Internal Revenue Code, 1939, and Section 5008(b), Title 26, United States Code.

II. To remove and conceal and to be concerned in the removal and concealment of certain goods and commo-

dities, to wit; distilled spirits, to a place other than an Internal Revenue Bonded Warehouse, provided by law, in respect whereof a certain tax due the United States is and shall be imposed, with intent to defraud the United States of America of such tax and each and every part thereof, the exact quantities and a more particular description of said distilled spirits and the tax imposed, other than as herein mentioned, being to the Grand Jurors unknown, said acts being then and there unlawful and contrary to the requirements of and not in accordance with the provisions of Section 2913, Internal Revenue Code, 1939, and Section 5632, Title 26, United States Code.

III. To have in their possession, in custody and under their control stills and distilling apparatus, set up, without registering same with the Regional Commissioner, Alcohol and Tobacco Tax Division, Bureau of Internal Revenue, as required by law, the exact number of said stills and distilling apparatus and a more particular description of same and the exact place or places at which said stills and distilling apparatus were set up, other than as herein set forth, being to the Grand Jurors unknown, said acts being then and there unlawful and contrary to the requirements of and not in accordance with the provisions of Section 2810, Internal Revenue Code, 1939, and Section 5174, Title 26, United States Code.

IV. To engage in carrying on the business of distillers without having given bond as required by law and to engage in and carry on the business of distillers with intent to defraud the United States of the tax on the spirits distilled by them and each and every part thereof, the exact places where said businesses were carried on and conducted and a more particular description of said businesses and the tax aforesaid, other than as set forth herein, being to the Grand Jurors unknown, said acts being then and there

unlawful and contrary to the requirements of and not in accordance with the provisions of Section 2833, Internal Revenue Code, 1939, and Section 5606, Title 26, United States Code.

V. To make and ferment in certain buildings and on certain premises, other than distilleries duly authorized according to law, certain mash, wort and wash fit for distillation and the production of spirits or alcohol and to have distillers and other persons separate the alcoholic spirits from certain fermented mash, wort and wash, said defendants then being persons other than authorized distillers, the exact quantities and a more particular description of said mash, wort and wash, and a more particular description of said buildings and premises and places, other than is herein mentioned, being to the Grand Jurors unknown, the said acts being then and there unlawful and contrary to the requirements of and not in accordance with the provisions of Section 2834, Internal Revenue Code, 1939, and Section 5216(a), Title 26, United States Code.

VI. To have and possess property intended for use in violating the provisions of the Internal Revenue Laws or Regulations prescribed under such laws, the exact places where such property was located and so used, other than as set forth herein being to the Grand Jurors unknown, said acts being then and there unlawful and contrary to the requirements of and not in accordance with the provisions of Section 7302 of Title 26, United States Code.

The Grand Jurors aforesaid do further present and charge that after the formation of said conspiracy and in pursuance thereof, and as a means of carrying out same, certain of the said conspirators and defendants at the several times and places hereinafter mentioned in connection with their names and during the continuance of said conspiracy did, among others, commit and do certain overt

acts to effect the object and purpose of said unlawful and felonious conspiracy, federation and combination and agreement; that is to say:

1.

That on or about September 1, 1954, co-conspirators Horace Twitty and Clyde Garner commenced buying five gallon bottles from the Southern Specialty Company, Memphis, Shelby County, Tennessee.

2.

That on or about September 8, 1954, co-conspirators Clyde Eugene Garner and Audrey Hart Garner, possessed sixty-three and one-half gallons of non-tax-paid whiskey in a cache at the rear of their home in Henderson County, Tennessee.

3.

On or about October 12, 1954, co-conspirators Sammy Joe Garner, Horace G. Twitty and Oren Cloud Fesmire, at the home of co-conspirators Clyde and Audrey Garner in Henderson County, Tennessee, possessed twenty, one hundred pound bags of sugar.

4.

On or about October 12, 1954, co-conspirator Audrey Hart Garner, in an unoccupied house in Henderson County, Tennessee, owned by Clyde and Audrey Garner, possessed two newly made Alabama Type wood still heads concealed under bags of fertilizer in the aforementioned house.

5.

On or about November 1, 1954, co-conspirator Clyde Eugene Garner commenced buying forty pound bags of oak hickory charcoal from Forest Products Chemical Company, Memphis, Tennessee.

6.

On or about January 20, 1955, on TVA land in Decatur County, Tennessee, co-conspirator Clyde Eugene Garner set up and operated two twenty-four hundred gallon still pots, commonly known as "35 sackers".

7.

On or about March 15, 1955, co-conspirator Oren Cloud Fesmire at his home in Henderson County, Tennessee, possessed ninety gallons of non-taxpaid whiskey.

8.

On or about April 21, 1955, and prior thereto, in the Garnertown section of Henderson County, Tennessee, co-conspirator Horace G. Twitty operated two, five hundred forty gallon stills and one, four hundred forty gallon still and had in his possession fifty-five gallons of non-taxpaid whiskey and fourteen hundred gallons of mash.

9.

On or about August 13, 1955, and for several weeks prior thereto, near the Bath Springs section of Decatur County, Tennessee, co-conspirators Hood Luther, Horace G. Twitty, Clyde E. Garner, Henry Laverne Nix and James George Reves operated six, five hundred gallon still pots and possessed three hundred gallons of sugar and meal mash.

10.

On or about November 14, 1955, co-conspirator and defendant, Edd John Mayo, at the home of co-conspirators, Clyde and Audrey Garner, in Henderson County, Tennessee, possessed approximately fourteen hundred pounds of sugar and two hundred pounds of wheat bran.

The Grand Jurors, aforesaid, do further present and charge that the overt acts herein alleged to have been committed during the continuance of and in furtherance of said conspiracy, confederation and agreement to effect the object and purpose of same; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

nm 10,000 or nm 5 yrs. or both.

A True Bill:

.....

Foreman

.....

UNITED STATES ATTORNEY

(CAPTION OMITTED)

ORDER RECORDING PLEAS OF NOT GUILTY AND SETTING CASE

(Filed March 27, 1956, 4:20 P.M.)

On March 27, 1956, came the United States Attorney for this district for the government and the defendant Horace Twitty, appearing with counsel, Joe Appleby, Esquire; the defendant Edd John Mayo, appearing with counsel, Roger Murray; the defendant Clyde Garner, appearing with counsel Joe Appleby and the defendant Audrey Hart Garner, appearing with counsel Joe Appleby; the defendants Sammy Joe Garner and Oren Cloud Fesmire – stating to the Court that they would secure attorneys; the defendants upon being arraigned for plea to the offenses as charged in the indictment herein stated that they are not guilty as in the indictment charged and the case is set for trial on June 6, 1956.

(s) MARION S. BOYD
United States District Judge

APPROVED:
(s) EDW. N. VADEN
Asst. United States Attorney

(CAPTION OMITTED)

NOTICE OF APPEAL

Names and addresses of appellants: Clyde Eugene Garner, Huron, Tennessee, Route 1; Audrey Hart Garner, Huron, Tennessee, Route 1; Horace G. Twitty, Huron, Tennessee, Route 1; Oren Cloud Fesmire, Huron, Tennessee, Route 1; Sammy Joe Garner, Huron, Tennessee, Route 1; Edd John Mayo, Lexington, Tennessee.

Names and addresses of appellants' attorneys: Joe Appleby, Lexington, Tennessee; Carmack Murchison, Bond Building, Jackson, Tennessee.

Offense: Violation of Title 18 Section 371, United States Code (Conspiracy Statute).

The indictment is in one count and charges the appellants with a conspiracy to violate the following laws of the United States:

Sections 2803 Internal Revenue Code 1939;
5008(b) Title 26 United States Code;
2913 Internal Revenue Code 1939;
5632 Title 26 United States Code;
2810 Internal Revenue Code 1939;
5174 Title 26 United States Code;
2833 Internal Revenue Code 1939;
5606 Title 26 United States Code;
2834 Internal Revenue Code 1939;
5216(a) Title 26 United States Code and
7302 Title 26 United States Code.

The foregoing statutes relate to, and define, offenses with respect to intoxicating liquors.

Concise statement of judgment or order, giving date, and sentences:

Notice of Appeal

The jury returned its verdict finding each of the appellants guilty on June 1, 1956 and, thereupon, the sentence was pronounced upon them by the Court on the same date. The judgment and sentence, however, were entered on June 4, 1956. The appellants were given the following sentences by the Court:

Clyde Eugene Garner sentenced to 3½ years imprisonment and fined $10,000.00, a committed fine;

Audrey Hart Garner sentenced to 18 months imprisonment and fined $5000.00, a committed fine;

Horace G. Twitty sentenced to 3½ years imprisonment;

Oren Cloud Fesmire sentenced to 18 months imprisonment;

Sammy Joe Garner sentenced to 18 months imprisonment;

Edd John Mayo sentenced to one year imprisonment.

The judgment or order overruling and denying the motion of the appellants for a judgment of acquittal or, in the alternative, for a new trial, was rendered by the Court on June 22, 1956 and entered on June 27, 1956.

The appellants are now on bail.

We, the above named appellants, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the above stated judgments and orders.

This June 29, 1956.

JOE APPLEBY,
Lexington, Tennessee.
CARMACK MURCHISON,
Bond Building,
Jackson, Tennessee.
Attorneys for Appellants.

GOVERNMENT'S PROOF

* * *

14

Mrs. Helen Adkins,

the first witness, having been first duly sworn, testified as follows:

* * *

Q. You live about a mile from Camden. Did you used to live about the Bath Springs, Tennessee?

A. Yes, I did.

Q. How long did you live there?

A. We lived there about three or four years.

* * *

17

Q. Now, back in June, 1955, while you were living there, I will ask you whether or not you had some arrangements with some gentlemen to cook for them and that sort of thing?

A. Yes, sir.

* * *

18

Q. Mrs. Adkins, do you know the name of the people we are talking about?

A. Well, I believe they told me one of them was Clyde Garner.

* * *

19

Q. Now, who was the other gentleman, Mrs. Adkins, what was his name?

A. Well, they called him Hode at that time, you know, but we found out later it was Hood Luther, I believe they said.

* * *

21

Q. Clyde Garner and Hood Luther. Did any other men come out at that time?

A. Well, yes, he was known to me as Red, but I believe they told me his name was Reves.

Q. Is that James Reves?

A. George Reves, I believe they told me.

Q. And you called him Red?

22

A. Yes, he was just known to me as Red.

Q. Were any other men around?

A. Well, I said it was him and Nix, and he was known to me as Greek.

Q. Greek Nix?

A. Yes.

Q. And the one they called Slim, what was his name, if you know?

A. Well, I don't know, never did hear nobody say.

* * *

Q. Will you look and see if you can see him in the court room, please, ma'am?

A. Yes, he is sitting right back there.

Q. Will you point him out so we can be sure.

(Witness points, as requested).

MR. JOYNER: Let the record show she indicated the defendant Horace Twitty.

* * *

24

A. After they was there about two weeks, they asked me would I cook for them.

Q. Who asked you?

A. Hood Luther.

Q. Hood Luther. And did you make some arrangements to cook for them?

A. Yes, I told him I could cook for them for ten Dollars a week.

Q. And you did?

A. Yes.

* * *

25

Q. While they were there, did you find out what they were doing there from them?

A. They were making whiskey.

* * *

27

Q. Well, you say Mr. Garner came there along in June. Did he ever come back, this Clyde Garner?

A. Well, seems like he did, seems like he make a trip or two.

* * *

Q. Now, let me ask you this, Mrs. Adkins. Did you ever see them hauling anything out, in, or hauling anything out while you were there?

A. Well, nothing only I did see them hauling some cots.

Q. Some cots?

A. Yes, and some lumber.

Q. And some lumber?

A. And some sugar.

* * *

28

Q. Did you ever see any other cars or trucks come there besides this one pickup you mentioned?

A. Yes, they had two black cars.

Q. What kind of cars was it?

A. Well, I believe they was Fords.

Q. Fords?

A. Yes, sir. And then they had a maroon Ford.

Q. Maroon Ford. Now, about these cars, did you ever notice the license plate on any of them?

A. Well, yes, I did. I know they had two license tags.

MR. JOYNER: Yes.

A. (Continuing) –A Sunflower, Mississippi tag, and a Chickasaw, Mississippi tag, and Alabama tag, and then they had a Dealer plate.

* * *

Q. A Dealer plate. Did you ever see any Tennessee license plates?

A. Yes, I saw a 57 Tennessee tag.

* * *

36

Q. (Continuing) –Well, did you ever hear Reves, Luther and Nix discussing anything about Mr. Garner coming?

A. Yes; I have, I have heard them talk about, you know, the days he was supposed to be down there, and talk about them getting a payday.

* * *

Q. No. I will ask you whether or not Mr. Garner was at your place along about the middle of August on a Saturday morning?

A. Yes, sir.

* * *

39

Q. Umhum. Would he come to your house or go to the boat landing, or where did he go when he would come?

A. Well, he hardly ever came to my house. He would come to my house one or two times, you know, and ask where they was, at the camp place.

Q. Well, how did he go, in a boat?

A. Yes.

* * *

41

Q. Did he ever ask you if they were at the still?

A. No, sir.

Q. Never did?

A. No, sir.

Q. Just asked you if they were at the camping place?

A. Yes.

* * *

Q. But the same direction?

A. No, they camped up the river, and the still was down the river.

* * *

CROSS EXAMINATION

42

By Mr. Appleby:

Q. Mrs. Adkins, you say the first occasion you saw any of these men was the time that Garner and Hood Luther came to your house?

A. Yes, and asked about a camping place.

Q. Asked about a camping site?

A. Yes.

Q. And then after that it was some time before you saw Garner again, wasn't it?

A. Yes.

Q. And these various conversations that took place there at your house between these men that you named, Garner was not present, was he?

43

A. No.

Q. And Garner was not present on any time that liquor or whiskey was discussed, was he?

A. No, sir.

Q. And Garner was not present at any time when a still was discussed, was he?

A. No, sir.

Q. And, as far as you observed, Garner was not present at any time when anything in connection with the operation of the still took place, was he?

A. Not that I saw.

* * *

50

Q. Mrs. Adkins, you say on these conversations up there at the river, when these conversations were carried on about the whiskey and still, Hood Luther and Nix and Reves, – that Mr. Garner was not present?

A. No.

Q. And Mr. Twitty was not present?

A. No, sir.

* * *

60

Clarence Adkins,

the next witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Joyner.

* * *

61

Q. Yes, sir. Now, before you moved to Camden, where did you live, Mr. Adkins?

A. Decatur County.

Q. Decatur County?

A. Yes, sir.

Q. And where in Decatur County?

A. Above Decaturville, about twelve miles.

* * *

62

Q. Is that in the Bath Spring community?

A. Yes, sir.

Q. And I will ask you whether or not that is right on the river, the Tennessee River?

A. Yes, sir, right where I lived, it was.

* * *

65

Q. Umhum. And how old are you, Mr. Adkins?

A. Thirty-eight.

* * *

66

Q. Mr. Adkins, how far did you go in school?

A. First grade, sir.

Q. Can you read and write?

A. No, sir, not to do any good. I read a little bit, barely write my name.

Q. You can sign your name?

A. Yes, sir.

Q. Umhum. Now, Mr. Adkins, back in June of '55, I will ask you whether or not some men came down there and stayed some time around your place there?

A. Yes, sir.

* * *

67

Q. And who else was there?

A. (Witness pointing) Horace Twitty, I think it is.

* * *

68

Q. Sir?

A. There were some more of them, but I don't see any of them.

Q. Do you remember their names?

A. No, sir.

MR. JOYNER: All right.

A. All I know, their names is just they went by Hode and Greek and Red, I hear them called.

* * *

Q. Now, which was the first one of them that came there?

69

A. Well, him and Hode.

Q. By "him", I can tell you this man's name, Clyde Garner.

A. Clyde Garner.

* * *

70

A. Clyde spoke the first word, and they both talked to me.

Q. What did they talk about?

A. Well, he asked me could they put a whiskey still down on my place, and I told them no.

* * *

71

Q. They did get to operating the outfit, you say?

A. Yes, sir.

Q. You mean by that they got the still going?

A. Yes, sir.

* * *

Q. Did they ever haul anything in or haul anything out?

A Yes, I saw them haul sugar in.

* * *

72

Q. Now, who was it you saw bring the sugar in?

A. Well Hood and Horace.

Q. Hode and Horace Twitty?

A. Yes, sir.

* * *

Q. Was it on trucks or in a car, or how did it get there?

A. It was in a car.

* * *

74

Q. Did you see them bring any lumber there?

A. Yes, sir.

Q. What kind of lumber was it?

A. Best of my knowledge, it was cypress and poplar.

Q. It was cypress and poplar?

A. Yes, sir.

Q. And who brought the cypress lumber in?

A. Well, Hode brought it on a truck.

Q. Well, Hode brought it on a truck. Now, what kind of truck was it, if you remember?

A. '55 Ford pickup truck.

* * *

75

Q. I see. And did you ever see them bring any other material in there of any kind besides the sugar or lumber and aluminum?

A. Well, wheat bran.

* * *

Q. Who was it brought the wheat bran in?

A. Well, Hood brought in most of it.

* * *

77

Q. All right, did you ever see Mr. Garner at the still?

A. No, sir, I did not.

* * *

Q. Did he ever come back to your place after the first time?

A. Yes, sir, come down there, hauled one load of whiskey out at night.

Q. Mr. Garner did?

A. Yes, sir.

* * *

78

Q. Horace came in with Mr. Garner?

A. Yes, sir.

Q. Did they come in a car or truck, or how did they get there?

A. Come in a car.

* * *

81

Q. And where was the still?

A. Something about a half mile or three-quarters of a mile down the river.

* * *

82

Q. Are they the ones that did stay down there?

A. Yes, sir, they stayed there.

Q. You mean Hode, that is Hood Luther?

A. Yes.

Q. And Red, that is Reves?

A. Yes.

Q. And Nix, that is Henry Laverne Nix?

A. Yes, sir.

Q. These stayed down there?

A. Yes.

Q. What about Twitty?

A. He was just in and out.

* * *

83

Q. How often was Clyde Garner down there?

A. He was not down there very often, sir.

MR. JOYNER: All right.

A. I think about three times, the most I saw him down there.

* * *

84

Q. Now, when the whiskey would be hauled out, in what kind of container would it be in? Would it be in jugs or bottles or what?

A. Jugs, mostly.

Q. Jugs?

A. Yes, sir.

Q. One gallon or five gallon jugs?

A. Some five gallons.

* * * *

87

Q. Yes. Now, about how often would Mr. Clyde Garner be there?

A. About three times is all I saw him down there.

* * *

CROSS EXAMINATION

By Mr. Appleby.

117

Q. Do you know how much Mr. Garner took at the time he was there?

A. No, I don't, just about fifty gallons, I think.

* * *

Q. Either Wednesday or Thursday night before the Highway Patrol raided on Saturday, and that is the

118

only time you saw Mr. Garner down there after whiskey, right?

A. That is the only time I saw him down there.

* * *

Q. Was that the 16th of August?

A. July, August, – must have been in August some time.

Q. It was about the 16th of August, to refresh your memory, wasn't it?

A. Yes, sir, somewhere along there.

* * *

120

Leo D. Jenkins,

the next witness, having been first duly sworn, testified as follows:

* * *

Q. Leo, where do you work?

A. Forest Products Chemical Company.

* * *

Q. Is that in Memphis, Tennessee?

A. Memphis.

* * *

121

* * *

Q. What is the brand name of the charcoal that Forest Products sells?

A. Red Seal Charcoal.

* * *

Q. Now, Leo, I believe during August of '55, a Federal officer came around to see you relative to this question of whether you had seen some men out there buying charcoal, is that right?

A. That is right.

* * *

124

Q. A'l right. Do you see any of those men in the court room who bought charcoal?

A. I see two that I loaded, I thought.

Q. All right, point those two out.

A. The little fellow with the green shirt on there.

Q. By the woman?

A. Yes, sir.

MR. HODGES: Let the record show he is identifying the defendant, Horace Twitty.

* * *

Q. Then who is the other one you see there?

A. The big fellow right here.

Q. In the white shirt here?

A. Yes, sir.

MR. HODGES: Let the record show he is correctly identifying the defendant, Clyde Garner.

125

Q. You don't know his name, but just recognize him when you see him, is that correct?

A. I don't know either one of them's name.

Q. When did you load him, Leo?

A. It was along in February, along the wintertime like.

Q. '55?

A Yes, sir.

* * *

133

Sol Haffe,

the next witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hodges.

* * *

Q. Mr. Haffe, what kind of business do you operate?

A. I operate the Southern Specialty Company in Memphis.

Q. Memphis, Tennessee?

A. Yes, sir.

* * *

134

Q. Yes. All right. Can you tell us whether or not — can you point out a defendant sitting here in the court room who, on prior occasions, has purchased five gallon bottles from you on different occasions?

A. The fellow sitting right behind this gentleman here.

* * *

THE COURT: Well, he plainly identifies the defendant, Twitty.

* * *

140

CROSS EXAMINATION

By Mr. Murchison.

141

Q. And do you know how many people manufacture that type water bottle, do you know that?

A. Well, only about two manufacturers, to my knowledge.

* * *

160

Ralph Lumpkins,

the next witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hodges:

* * *

Q. What is your occupation, Mr. Lumpkins?

A. Treasury Agent, Criminal Investigator assigned to the Alcohol and Tobacco Tax Division.

Q. Are you in charge of the Jackson office of that Division?

A. Yes, sir.

* * *

161

Q. All right. When did your investigation in this matter start, Mr. Lumpkins?

A. It started back in September, '54.

Q. All right, tell us about that.

A. Well, in September we located a stash of whiskey in the Garnertown section of Henderson County. It was located —

* * *

162

Q. I see. Now, I interrupted you. Go on and tell us when you began your investigation in this matter concerning the conspiracy indictment?

A. Well, we found a stash behind, not far from Clyde Garner's house, behind his house.

* * *

163

Q. This stash of illicit whiskey behind Garner's house, I wish you would tell us where it was.

A. Well, it was directly behind his house in a wooded area. It is one hundred and fifty yards back of his residence.

* * *

Q. All right, when was that, again?

A. Let's see, stash located about two thirty P. M. on September 8, '54.

Q. Now, what kind of containers were these sixty-three and a half gallons moonshine or illicit whiskey in?

A. Well, they had one five-gallon glass jug and several one-gallon glass jugs and half gallon jugs. One forty-five gallon whiskey barrel there.

* * *

164

Q. All right, did you find anything else?

A. Well, there were sixty-three and a half gallons moonshine at this stash. And the same day we were investigating an illicit distillery which was across the road from this place leading off from what is the Clyde Garner old home place.

* * *

165

Q. All right. Were there any roads, what were the roads, the physical location of them, around this still which was in process of being dismantled?

A. There was a road going right by it, going through the yard of Clyde Garner's old home place, which is located approximately two hundred or two hundred and fifty yards west of Clyde Garner's residence, and this road went right

through his yard and went to the distillery, all freshly travelled, just went from the yard to the distillery.

* * *

166

Q. Now, where does Oren Cloud Fesmire live?

* * *

167

Q. You say during that period of time, most of the time he lived in Clyde Garner's old home place?

A. Yes, sir.

Q. Where is it located, where is the location of that house in relation to the home occupied by Clyde Garner and Audrey Garner?

A. Just down the road behind his house, about two hundred or two hundred and fifty yards.

* * *

168

Q. All right, now, go ahead, tell us about it.

A. We were looking for Horace Twitty at that time. There was a warrant out for his arrest on a conspiracy case in Alabama.

* * *

Q. Don't tell us about the information. I had asked you what you were doing. Just tell us what you did after you got down there.

A. Well, it was afternoon, and this '49 –, 1949 International Truck pulled up in the side yard of Clyde Garner's house, and Horace Twitty and Sammy Joe Garner –

* * *

170

Q. Tell us what happened?

A. We examined the truck right then, found that it contained a to- of sugar, twenty one-hundred pound bags of sugar. I went on across the road to get the pickup truck down in a field. I saw two men circle back up at Mutt Garner's, who lives across the road from Clyde.

* * *

Q. That is this gentleman in the green checked shirt?

A Yes. So I asked Sammy Joe what he was doing, and he did not say anything. So it looked like he was trying to hide his shirt, — he didn't have on any undershirt, it looked like he was trying to hide his shirt. I told him he would have to come back to the car. I picked up the shirt, and in the pocket of the shirt was two notes, and the first one read —

Q. Just a minute. Well, we will just get the notes.

A. All right.

171

(Documents examined by counsel.)

Q. Now, let me ask you further, you stated that, I believe, Horace Twitty and Sammy Joe Garner were there at that time. Was the defendant, Oren Cloud Fesmire there, too?

A. Yes, sir, he came up with Edd Mayo, I believe. I am not sure whether it was Edd Mayo or another colored man in an old truck at the time. And I believe that Fesmire was pushing him with his car, when I got back to the truck at the time.

* * *

Q. You stated you took from Sammy Joe Garner two

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notes, and I ask you to examine the two notes there and tell us whether or not they are the two notes you removed from Sammy Joe Garner?

A. Yes, sir, that is the same two notes.

MR. HODGES: I ask they be marked as Collective Exhibit 1 to the testimony of the witness.

(Said documents were accordingly marked as Collective Exhibit 1 to the testimony of Mr. Lumpkins, and same will be found among the exhibits hereto.)

Q. Will you read –, I will read these to the jury:

"Joe go to John Webb and ask him if Edd Mayo has paid for the–" –it looks like "me", – "twenty sacks of S if he says he diden you give him this other note, /S/ Audrey." is that the first note?

A. Yes.

Q. Rather, it is part of Collective Exhibit 1?

A. Yes, sir.

Q. – That you removed from the defendant, Sammy Joe Garner.

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The second note reads: "Let this boy have 20 I will be in & pay for it Sat. /S/ Audrey Garner."

Was this the second note?

A. Yes, sir.

* * *

Q. That is the two notes you removed from the defendant, Sammy Joe Garner, at that time?

A. Yes, sir, shirt pocket.

* * *

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Q. I think you said something a while ago about the keys to the truck. What did you say about the keys to the truck?

A. The keys that fit the truck, that turned on the ignition, and the keys that fit the pocket of the truck, were found in the pocket of Sammy Joe.

* * *

175

Q. In your presence did Mr. Hynds remove anything from the billfold of Horace Twitty on this occasion?

A. Yes, sir.

Q. What was it, as well as your memory serves you?

A. He removed a bill for sale of a truck made out

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in the name of Pickens, I believe.

* * *

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Q. Now, from Twitty's billfold, I will ask you if you got this note which I will hand you?

A. Yes, sir, this was taken from the billfold.

Q. What does that note read?

A. On the back it says, "Jiggs, you wait on Sammy Joe. /S/ Horace". Says, "Keep this paper", had some figures on it, 105½, 103, 34½.

* * *

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Q. (Continuing) – Did you question Mr. Twitty about this bill of sale?

A. Yes, sir, two days later we took Mr. Twitty from the Madison County Jail out to the Davidson Motor Company,

where one of the salesmen identified Twitty as having purchased the truck that the bill of sale was made out to.

* * *

Q. The bill of sale for a '46 Ford Truck, 779Y-1720406, that is the motor number on it?

A. Yes, sir. The truck was subsequently seized at a distillery.

* * *

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Q. But on the date you took that bill of sale from the defendant Twitty, that truck at that time was being pushed down the road by defendant, Oren Cloud Fesmire, and the other defendant, Edd John Mayo?

A. Yes, sir.

* * *

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RALPH LUMPKINS, the said witness, upon returning to the witness stand, and having been previously sworn, testified further as follows, and out of the presence of the jury:

* * *

DIRECT EXAMINATION (further)

By Mr. Hodges.

Q. Now, Mr. Lumpkins, I believe you previously testified that on October 12, '54, you were out in the Garnertown Section of Henderson County, and searching for defendant, Horace Twitty, as you had a warrant for his arrest, is that correct?

A. Yes, sir.

* * *

THE COURT: I am trying to find out where this house is located, the vacant house.

A. It is on another tract of land, that is approximately a mile from Garner's residence.

THE COURT: Then you did come there first?

A. Yes, sir.

THE COURT: Looking for Twitty?

A. Yes, sir.

THE COURT: With a warrant?

A. Yes, sir.

THE COURT: From the State of Alabama?

A. Yes, sir.

THE COURT: Charging –

A. Conspiracy.

THE COURT: Conspiring to violate the Internal Revenue Laws?

A. Yes, sir.

THE COURT: From the Federal Court?

A. Yes, sir, a bench warrant.

THE COURT: And you went –, who owns this property?

A. The Garners.

THE COURT: This vacant house?

A. Clyde and Audrey Garner.

THE COURT: And you were under the impression that Twitty was there in that particular house, is that it, is that the reason you went there?

A. We knew that he had been seen around this house building the stillheads.

THE COURT: And on looking in you found these stillheads that you refer to?

A. Yes, sir.

THE COURT: And did you leave them there, then go back for them?

A. We left the stillheads there at that time. We were planning to make further investigation, of course.

THE COURT: Stillhead, is that an important part in a still, or is that practically the still itself?

A. Well, all you need in addition to what was there was a sheet of metal to wrap around the stillhead. It is a circle. It is a –

THE COURT: It is a good big part of the still, then, is that correct?

A. Yes, sir, stillhead.

* * *

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CROSS EXAMINATION

By Mr. Appleby.

* * *

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Q. How far is that house, actual distance, from the home where Clyde and Audrey Garner live now and lived then?

A. Well, if you went by the blacktop road, to the Chapel Hill church, and then turn on that road and went back to this farm, it would be approximately a mile.

* * *

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DIRECT EXAMINATION

By Mr. Hodges:

* * *

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Q. Tell the Court and jury what a stillhead is.

A. Well, they had a type still, it is just –

MR. MURCHISON: I object to his using

this expression, "a twitty type still", Your Honor. There is no proof here. That is just to prejudice the defendant, Twitty, before the jury without any basis.

THE COURT: Well, the District Attorney should develop that situation further before making use of that term.

MR. HODGES: All right, sir.

THE COURT: He did make statements, he did make reference to it in his opening statement.

MR. MURCHISON: I am aware of that.

THE COURT: And if this witness knows about that, you may lay the basis for it before making further reference to a twitty still.

* * *

Q. First off, Mr. Lumpkins, tell us what –, describe the type still heads you found, and what a stillhead is, for the jury.

A. Well, it is a wooden head, and it is a circular –, it is made into a circle, and it sits –, the stillhead is in the top of a cylinder that has a wooden top and wooden bottom in the cylinder and galvanized metal or copper all around the outside. It is a type still where they set the wooden bottom into the ground and put about six inches of dirt around it, and then fire the still from around the sides of the metal.

Q. When you say stillhead, it is a still pot in a sense, where the pot is used just off the ground and fired underneath?

A. In this particular type still it is fired from the side instead of underneath.

Q. I understand that. This is part of what would be called a still pot?

A. Yes.

Q. This construction used here, naturally, has a wooden bottom, you would not put fire underneath it, so you put it in the ground, a short distance in the ground, and build the fire around it, is that correct?

A. That is right.

Q. All right, now, go ahead. Now, when was the first time you ever saw this type of still? As you say, the usual type of still, the pot is off the ground, and the fire is underneath there, isn't it?

A. Yes, sir.

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Q. All right, when did you first see this type of still? You have been an investigator how long?

A. Five years.

Q. And all your investigations consist of the apprehension and detecting of illicit distilleries, that is true, isn't it?

A. Yes, sir.

* * *

Q. When did you first come upon this type of still, the still I am talking about, the type you found in this abandoned house you found approximately a mile from the house of Clyde and Audrey Garner, these two, when did you meet the still there?

A. We first started observing this type of still after Horace Twitty moved down to Garnertown and while he was living down at Henderson a short while before going to Garnertown.

Q. Had you ever found this type still there before?

A. Not in this immediate area. We found it occasionally down on the Alabama line.

* * *

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Q. This is the only type still you found in the Garnertown section of Henderson County?

A. Yes, sir, they started using that kind exclusively.

Q. After he moved in with Clyde and Audrey Garner?

A. Yes, sir.

Q. All right. Does that type of still generally have a name among law enforcement officers?

A. Well, in this particular area, it is referred to as a Twitty type still.

* * *

A. (Continuing) Because it is the only place where we found –

MR. MURCHISON: I am objecting to that, if your Honor please, because it is a deliberate attempt to prejudice this defendant on unsubstantial type of evidence.

THE COURT: Mr. Lumpkins, do you know –, do you know personally, – how long have you known Twitty?

A. Since about the middle of 1954.

THE COURT: Do you know firsthand about his ability to build a still, do you know anything about that?

A. Just on reliable information, and quite a bit of information to that effect.

THE COURT: You don't know firsthand about that?

A. No, sir, I have never seen him construct one.

THE COURT: You are merely testifying that since he came into this particular section, this type of still showed up, is that what you are saying?

A. Yes, sir.

THE COURT: And that the officers do refer to these stills as being Twitty stills?

A. Yes, sir.

THE COURT: You don't know how that comes about other than they showed up first after he moved into this section?

A. That is right.

THE COURT: Well, with no more than that, I doubt if you are warranted in referring to

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these stills as being Twitty stills, Mr. Hodges, and the Court sustains the objection.

* * *

Q. Just refer to it as a still, Mr. Lumpkins.

You say these two stills found in this house were newly made. You mean by that you could look at that and tell they were newly constructed and had never been used, is that what you meant?

A. Yes, sir.

MR. APPLEBY: We object to that. That is leading.

MR. MURCHISON: I object to that. He did not say stills were found in the house.

Q. Well, how much else is needed to constitute a still, if I use the term a little loosely and by that troubled counsel, – how much else is needed, Mr. Lumpkins?

A. A sheet of metal around the top connecting the wooden top and wooden bottom.

* * *

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Q. Jump on to the next day.

A. Well, on October 19th, we returned to Garnertown again and checked the same building with the wooden stillheads. While we were in the area, Audrey Garner was running the roads, and she flagged us down, got out of the car, came up to the door of our car, and she was standing there juggling some bullets, and she told us at that time –

MR. MURCHISON: A little bit louder.

A. (Continuing) – When she walked up to the door of our car after flagging us down, she was juggling some .22 bullets, and she told us she had just placed –

MR. MURCHISON: Now, –

A. (Continuing) – A lock on the door of her house over there.

Q. What house is that?

A. This is the abandoned house that had the stillheads.

* * *

222

Q. Tell us whether or not she stated that she owned that building?

A. She did.

* * *

225

Q.* * * Now, I believe your next investigation was around May 4, '55?

A. Yes, sir.

Q. All right, what happened then?

A. We went to a section known as Brodies Landing in Decatur County, on the Tennessee River, on TVA property.

Q. That is Decatur County, Tennessee?

A. Yes, sir.

MR. HODGES: All right.

A. (Continuing) – And there we found one twenty-four hundred gallon still pot, the type you forment and cook all in the same pot, and all indications in the still yard were another twenty-four hundred gallon pot had been set the same place but had been moved out.

Q. This was TVA land, you say, near Brodies' Landing?

A. Yes, sir.

* * *

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Q. Was this type of still here –, is that what –, what is the common nickname of it?

MR. MURCHISON: I am going to object to that.

Q. (Continuing) – If you know?

A. The common name we all refer to is a Twitty-type still.

* * *

Q. I don't mean using any individual's name, Mr. Lumpkins. Is there any other nickname that you refer to that type of still?

A. It is commonly known as a 35-sacker.

MR. HODGES: All right.

A. (Continuing) – Contains thirty-five one hundred pound sacks of sugar.

Q. That is the reason for the nickname "35-sacker", because it takes how much sugar?

A. They usually put about thirty-five hundred pounds of sugar.

* * *

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Q. Skipping down to July 7, 1955, Mr. Lumpkins, tell us whether or not if you, accompanied by Investigators Hynds and Lewis, what you all did near

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that "Y" Inn near Henderson, Tennessee.

A. Well, Hynds and Lewis, and Tennessee Highway Patrol Corporal R. B. Blasingame and myself investigated an abandoned house that was owned at that time by Clyde

Garner, which is a short distance from the "Y" Inn, it was, and found seventeen and a half gallons untax-paid whiskey contained in four five-gallon glass jugs.

* * *

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Q. Don't go into that, because you did not look up the legal title to it.

Tell us about this '40 Model Black Ford you observed, and other matters you observed on that date.

A. Well, on July 7th, with Hynds and Lewis and myself, before we picked up Corporal Blasingame, we observed an old 1940 Model black Ford car and a 1951 Model Maroon Ford parked at the "Y" Inn, and at the time we passed the 1940 Ford, the license Number 7-2625, this '55 Tennessee plate attached to it, the '51 Maroon Ford did not have any license plate, and Horace Twitty went down the road and turned around and came back, and as we passed by the second time, just a few minutes later, Twitty and another man were in the Maroon '51 Ford, pulling away from the "Y" Inn. At the time the 1940 Ford had no license plate, and the '51 Ford had license plate 7-2625 on it. And when they went down the road, they went right by this house where we found seventeen and a half gallons of whiskey down there, and turned around and came back.

* * *

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MR. MURCHISON: Now, we want to object to that last testimony there, with respect to all the liquor found in this house down there near the "Y" Inn, on the ground that there is no proof that the defendants or any of them are connected with it, and it is prejudicial to the defendants, and ask Your Honor to direct the jury to disregard that proof.

THE COURT: On the District Attorney's statement that it will be connected up, the evidence will remain in the record.

MR. HODGES: If your Honor please, I think Mr Murchison—, I want to be sure the record is straight on that, the 35-sacker stills will be connected up. Mr. Lumpkins here did not realize what I was asking him. I asked him not to tell about the seventeen and a half gallons because we admit that that is not connected up with these defendants, and we agree that the jury should not consider that.

MR. MURCHISON: Now, just a moment. I am

going to enter a motion for a mistrial. He has gone into this matter deliberately and has brought out proof of a substantial amount of whiskey, which they admit these men had no connection with.

MR. HODGES: Mr. Murchison knows very (well) I did not do that. I asked Mr. Lumpkins not to testify about that. It is in his notes; it is all written up on the same notes.

MR. MURCHISON: He made the inquiry twice.

THE COURT: The motion for mistrial is overruled. The jury is instructed that the testimony concerning seventeen and a half gallons of untax-paid whiskey allegedly found in a vacant house down there in Chester County, you will not consider for any purpose in your consideration of this lawsuit.

* * * *

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CROSS EXAMINATION

By Mr. Appleby:

* * *

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Q. What did you find on that occasion?

A. Well, on September 8, 1954, we found sixty-three and a half gallons nontax-paid whiskey.

Q. And where did you find that?

A. That was directly behind Clyde Garner's house, in a westerly direction.

Q. When you say "directly", do you mean directly as interchangeable with immediately behind Clyde Garner's house?

A. About one hundred and fifty yards behind his house.

* * *

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Q. What distance is it from the house of Clyde Garner to the house of Louis Fesmire?

A. I believe we estimated it about two hundred and fifty yards.

* * *

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Q. Well, you followed the blacktop road down to the field or wood road, whatever it is, and followed the wood road down to the place where this whiskey was cached, is that right?

A. Yes, sir.

Q. Do your know on whose premises that whiskey was located?

A. I am not sure who owns it.

MR. APPLEBY: Yes, sir.

A. (Continuing) I know that Clyde Garner has worked that field right there next to it.

Q. I am talking about the whiskey was located in this wooded tract, wasn't it, Mr. Lumpkins?

A. Yes.

* * *

241

Q. Yes, but I would like you to respond to my question. I say you did not mean to leave the impression yesterday on the question of the District Attorney that you saw Sammy Joe Garner and Horace Twitty get out of the truck when it drove up there. Can you answer that yes or no?

A. No, I did not see them get out of the truck there.

* * *

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Q. But that was before you saw the three defendants that you have mentioned with the ton of sugar?

A. Yes, sir, we had been to the abandoned house looking for Twitty before we found the truckload of sugar.

Q. Now, on that occasion you say you found these two stillheads?

A. Yes, sir.

* * *

244

Q. Now, this stillhead, you said it was being—, in the process of being made or just been completed?

A. Yes, sir, just been completed.

* * *

Q. Well, there was nothing to it except two round flat boards, a number of boards that had been put together in a circular, flat object?

A. Yes, sir, with a hole cut in the top of the wood.

* * *

245

Q. Yes, sir. Now, on the date that you were out there, October 12th, you said you were out there looking for Horace Twitty?

A. Yes, sir.

246

Q. Did you have a warrant, or written warrant in your possession for his arrest?

A. No, sir, we had been notified that there was a bench warrant out for his arrest. We were asked to see if we could find him.

Q. When you testified yesterday you had a warrant for him, you were mistaken about that, weren't you?

A. We just had knowledge that there was a warrant out for Horace Twitty.

* * *

Q. And at that time you did not even know Horace Twitty, did you?

A. Well, I had never really seen enough to really know him. I had seen him before on a previous investigation.

Q. But you had to have this picture in order to identify him, didn't you?

A. Yes, sir, I did.

Q. Now, at that time you did arrest Horace Twitty?

A. Yes, sir.

Q. Did you arrest Sammy Joe Garner?

A. No, at that time we did not.

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Q. Did you arrest Oren Fesmire?

A. No, sir.

* * *

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Q. And you testified on yesterday that subsequent to the date of October 12th you found a still pot in the vicinity of Garnertown, is that right?

A. Yes; sir.

Q. And where did you find that?

A. The same day we got the sixty-three and a half gallons of whiskey. It was September 8th.

Q. Was that still pot that you found located to the rear of Oren Fesmire's, sort of north of the blacktop road?

A. Yes, sir.

Q. And about how far to the rear of the house of Oren Fesmire was that located?

A. Oh, it was approximately a mile.

* * *

251

Q. Did I understand you to testify yesterday, Mr. Lumpkins, that Horace Twitty lived with Clyde Garner?

A. Yes, sir.

Q. Do you know that?

A. Twitty has told us several times he lived with Clyde Garner.

* * *

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Q. Do you know where Sammy Joe Garner lives, with respect to Clyde Garner's house?

A. Yes, sir, he lived right across the road with his father, Mutt Garner. However, he has a house of his own now.

Q. He has a house of his own now?

A. Well, there is another house there across the road there that Sammy Joe told me he was going to live in since he had gotten married.

Q. Do you know what his age is?

A. I believe nineteen or twenty.

Q. Nineteen or twenty?

A. Yes, sir.

* * *

255

Q. You placed Sammy Joe and Twitty, Sammy and Fesmire under arrest?

A. Twitty.

Q. You placed Sammy Joe under arrest, now?

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A. Yes, sir, and carried him back there with us. He had the keys to the car and notes for sugar in his pocket.

Q. And after you had obtained all this information you released him, is that right?

A. Yes, sir.

Q. Where did you obtain this note?

A. Out of the pocket of his shirt.

Q. And where did you obtain the keys to the truck?

A. Out of the pocket of his trousers

* * *

266

Q. "On or about March 15, 1955, Oren Cloud Fesmire did unlawfully have in his possession ninety gallons non-tax-paid whiskey".

That is the case I am referring to, Mr. Lumpkins, and ask you if he was not indicted on that charge, and if he did not enter a guilty plea to that in Federal Court, and if he did not receive a sentence of eleven months and twenty-nine days.

A. Best of my judgment, he pleaded guilty and was sentenced.

* * *

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Q. The defendant, Sammy Joe Garner, has never been charged previously by your Department of any offense, has he?

A. I have never filed a complaint against him before a Commissioner, no sir.

Q. The defendant, Audrey Garner, has never been charged, or you have never filed a complaint against her, have you?

A. No, sir.

* * *

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Q. And you say this whiskey was in gallon and five gallon containers, is that right?

A. There was one five gallon glass jug, and one whiskey barrel, and the rest of it was in one gallon jugs and half-gallon jugs.

Q. And this whiskey was destroyed there?

A. Yes, sir.

Q. How much whiskey was destroyed there on that occasion, Mr. Lumpkins?

A. Sixty-three and a half gallons, I believe.

* * *

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REDIRECT EXAMINATION

By Mr. Hodges:

Q. Mr. Lumpkins, restricting your testimony solely to the truck, I am referring to an event here about October 14th of '55, in Clyde Garner's yard, did you seize a '53 Chevrolet truck loaded with approximately fourteen hun-

dred pounds of sugar and two hundred pounds of wheat bran, and tell us about that, solely about the truck and seizure, and not the other matters prior to that?

A. Well, I was there with Investigator Guess and we were investigating a distillery, just came from a

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distillery up by Garner's.

Q. Don't tell us about that. That is what I don't want you to testify about that.

A. At this time we saw a truck, we were looking at it, it belonged to Edd Mayo, sitting in the drive at Clyde Garner's, sitting right at the edge of his house, in fact, almost up against his house, and we could see, whenever we pulled up, there were a load in it, it contained sugar, could see it on the bags, where it had had a tarpaulin, but we went ahead, pulled it back up, we pulled up and stopped, knocked at the door of Clyde Garner, no one answered, hollered for him, no one would come down.

Q. The lights were burning inside?

A. The lights were burning inside there.

Investigator Guess climbed up to the back door to count the sugar, and about that time Mayo came around the corner of the truck.

Q. This is Mayo right there?

A. The defendant seated there.

Q. You mean Edd John Mayo?

A. Yes, sir.

Q All right, go ahead.

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A. He came around the corner of the house with his left hand in his pocket, being a left-handed man. I searched him. He had a .22 pistol in his pocket. He said it was

his truck and his sugar. It was not his sugar, — that he was paid to bring it out to Clyde Garner's house, that he had picked it up at the U-Tote-Em Grocery Store when they were closing.

* * *

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RECROSS EXAMINATION

By Mr. Appleby:

* * *

Billy Williams,

next witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Joyner:

Q. * * * And where do you live, please, sir?

A. Lexington.

Q. What sort of business are you in?

A. Well, right now I am in the grocery business.

Q. And are you or were you with the United Grocery Company at Lexington, Tennessee?

A. Yes, sir.

* * *

277

Q. And about that time, I will ask you whether or not you had occasion to load out several fairly good sized loads of forty pound bags of charcoal?

A. Yes, sir, a few times, several bags.

Q. I will ask you whether you sold any to anybody there you presently see in the court room?

* * *

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Q. Do you recall selling any to anybody you see in the court room, around March, '55?

A. Just one.

Q. And which individual is that you are talking about? Will you identify him for us, please, sir?

(Witness points as requested.)

Q. You mean this man here?

A. Yes.

MR. JOYNER: Let the record show he identified Mr. Horace Twitty, one of the defendants.

* * *

Q. And during that time did you have occasion to sell once or more than one occasion to Horace Twitty?

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A. Well, you take so many people around, so many customers in and out, I can't say exactly, but two or three times.

* * *

A. Well, I can't tell you exactly, you know, so many do go in and out.

Q. Yes, sir. But your best estimate.

A. Well, it would run from ten, fifteen, twenty, maybe sometimes.

Q. What size bags would it be?

A. Forty pounds.

Q. Forty pounds. Now, I would like to ask you whether or not along that same period you had occasion to bill some charcoal out to John Storey, or the John Storey Store?

A. That is the way it was billed out.

Q. It was billed out that way. Well, was that the charcoal which you sold to this man?

A. It was all billed out that way.

Q. All billed out to John Storey or the John Storey Store?

A. Yes, sir.

* * *

280

Q. What I am getting at, how did it come about the charcoal you sold to Horace Twitty was billed to John Storey?

A. Well, this man said bill it out that way.

Q. This man said it, Horace Twitty, is that right?

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MR. MURCHISON: Wait a minute.

A. Yes, sir.

* * *

CROSS EXAMINATION

By Mr. Murchison:

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Q. Now, Mr. Williams, I believe each and every one of these is a bill to John Storey, isn't it?

A. That is the way they are billed out.

Q. Well, John Storey was actually the man that got most of that, wasn't he?

A. He got some of it.

* * *

284

Q. And this man, Storey, then, was actually the person who received this charcoal, was he, in most of those cases?

A. Well, he come there and gave us his name, as I say, and had it billed out to him, and that is the

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way the rest of it was billed out.

* * *

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Q. If I understand, then, every single sale or delivery or load that you helped put on the truck for anybody there of charcoal was billed to John Storey?

A. Yes, sir, it was billed to him.

* * *

287

Hooper Fiddler,

the next witness, having been first duly sworn, testified as follows:

* * *

Q. What sort of business are you in?

A. I am with the U-Tote-Em Company, in the grocery business.

Q. Have you been there–, or were you there in November '55?

A. Yes, sir.

* * *

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Q. And what was your position with the U-Tote-Em Grocery at Lexington?

A. I am the manager of the local store.

Q. Manager of it. I would like to direct your attention, Mr. Fiddler, to an occasion in November of '55, and I would like to pass this to you. That purports to be a check dated November 14, '55, to the U-Tote-Em Grocery, and I ask you whether or not you received that check?

A. Yes, sir.

* * *

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Q. Mr. Fiddler, that check is in the amount of $147.16, is it not?

A. Yes, sir.

* * *

Q. And it purports to be signed by whom?

A. Audrey Garner, by Clyde Garner.

* * *

Q. And what was the check in payment for?

A. It was for fourteen bags of sugar and two bags of wheat bran.

Q. Who came to your place to get it, who brought the check in?

A. Edd Mayo.

* * *

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Q. And how much bran?

A. Two.

Q. Two bags?

A. Two bags.

Q. Were they one hundred pound bags?

A. Yes, sir.

* * *

292

Q. All right. When you got this check, Mr. Fiddler, from Edd John Mayo, was the check completely filled out?

A. No, sir.

Q. How much of it was filled out?

293

A. The signature.

* * *

Q. And did you get it from Mayo himself?

A. Yes, sir.

Q. And who filled it out?

A. I did.

Q. You did?

A. I did.

Q. On whose instructions?

A. Sir?

Q. Edd Mayo's?

A. Yes, sir.

Q. And I assume it was filled out for the amount of the purchase, is that right?

A. That is right.

* * *

295

Elvin Sego,

the next witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Joyner:

* * *

Q. Mr. Sego, what is your occupation?

A. I am assistant cashier, Central State Bank, Lexington, Tennessee.

* * *

Q. I would like to inquire of you, sir, about a check which is on the form of First National Bank at Lexington, and has the Central State Bank written above it, and ask you, sir, if you recall having processed that check in your bank?

A. Yes, sir, I do.

* * *

297

Q. When you contacted her, what transpired?

A. She said it was a mistake, that it should be drawn on the Central State to begin with.

* * *

Q. I notice the check part of it is pencil, and there are some pen notations, Central State has been written above First National, and there is an

298

additional signature of Audrey Garner there on the check.

A. Yes, she changed First National to Central State and also signed her signature above the signature that was already on the check.

Q. I see. At the time this transpired, was the account of Mrs. Garner in your bank a joint account?

A. No, sir, it was just in her name, but checks was OKed by Clyde. Clyde was authorized to write checks on her account.

Q. He was authorized to write checks on her account?

A. Yes, sir, he was.

* * * *

Q. I understand. Do you remember the approximate date that it was that you saw Mrs. Garner and this check was changed?

A. It was changed on the 16th day of December.

299

Q. 1955?

A. '55. That is the date we paid the check.

* * *

301

Herman Nichols,

the next witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Joyner:

* * *

Q. Mr. Nichols, where do you live?

A. I live at Paris, Tennessee, but I work at Lexington.

Q. In what sort of employment are you engaged there, please, sir?

A. I am bookkeeper at United Grocery Company.

* * *

302

Q. We have issued subpoena for you to bring several here. – (Documents examined by counsel.) I would like, Mr. Nichols, to get from you your invoice number 437, dated August 9, 1954.

MR. MURCHISON: Now, if the Court please, I am going to object to any reference to an invoice dated August 9, 1954, on the ground that it is prior to the date of the alleged conspiracy as set forth in this indictment.

MR. JOYNER: I believe the indictment alleges on or about September 1st.

THE COURT: Well, I think that is close enough in point of time. However, we can't go much beyond that date, now. You have fixed the date of September 1, '54, as the commencing date of this alleged conspiracy, on or about that date, rather, and you will

303

have to –, and this is something over two weeks off, –

MR. MURCHISON: Three.

THE COURT: (Continuing) But I think it is close enough in point of time. But I will let it in.

MR. MURCHISON: I believe he said August 9th, Your Honor, not 19th. Ninth.

MR. JOYNER: Ninth.

THE COURT: August 9th.

MR. MURCHISON: We object.

* * *

Q. Now, I will ask you whether or not it is customarily or frequently done at your place of business that the license

number of the truck which picked up a load is noted on the invoice for the load?

A. Yes, sir, it is.

* * *

307

Q. Um'hum. And would you, please, sir, read the license number which appears on that invoice?

A. 57 F-1-528.

* * *

Q. Now, Mr. Nichols, I would like to refer you to your invoice number 886, dated September 23, 1954, to the Webb Grocery for five hundred pounds of sugar, in the amount of $45.75. Do you have that one?

A. Yes, sir.

Q. And do you have a license number on it?

A. Yes, sir.

Q. What is that license number?

308

A. 57 P/1-107.

* * *

312

John Webb,

the next witness, having been first duly sworn, testified as follows:

* * *

Q. Mr. Webb, where do you live?

A. Lexington.

Q. And your occupation is what?

A. Grocery business.

Q. Is that Lexington, Tennessee?

A. Yes, sir.

Q. You operate the Webb Grocery there?

A. Yes, sir.

* * *

313

Q. Let's just make it, then, from September 1st '54, now. Did you have occasion to make large purchases –, I mean large sales of sugar to Clyde and Audrey Garner?

A. Yes.

* * *

315

Q. All right, give us your best estimate of the amount of sugar sold him in September, October, November, – or from September, '54, on.

THE COURT: September the first.

A. Just as estimate?

MR. JOYNER: Yes, sir?

A. Well, I would say about sixteen thousand pounds.

* * *

Q. And that was sold to whom?

A. Well, it was sold to all of the buyers.

Q. By all of the buyers, whom do you mean?

A. Well, the various, different ones would come get it. It was not all sold to one.

Q. Yes, sir. But who are the ones, is what I am getting at, their names?

316

A. Well, it was Horace, and–

Q. Horace who?

A. Horace Twitty.

* * *

Q. And who else would come pick it up?

A. Well, just –, the ones I have listed there in the statement, I don't recall exactly.

MR. HODGES: Give him the statement to refresh his memory.

Q. If you have your statement there and need to refresh your recollection about it, you can use it.

A. It is Clyde and Audrey and Horace.

317

Q. Well, now, I will ask you about a particular occasion in October, '54, about October 12th, '54, whether anyone in the court room came and picked up two thousand pounds of sugar?

A. Oh, why that was the case of Sammy Joe–.

Q. Sammy Joe Garner?

A. Yes.

* * *

318

Q. Now at the time he picked that up, what kind of truck did he pick it up in?

A. I don't know, it was an old model International truck.

* * *

Q. Now, at that time, – who later came in and paid for that load of sugar?

A. Audrey.

Q. Audrey Garner?

A. Yes.

* * *

319

Q. For instance, when Sammy Joe Garner picked it up, who was paying it?

A. That was later.

Q. Who paid it?

A. Audrey did.

* * *

320

Q. Yes, sir. Do you remember any other occasion when Horace Twitty or Sammy Joe Garner came in there and picked up large amounts of sugar?

A. Yes.

* * *

321

Q. All right, you will find on there some license numbers. Will you look at those and tell me whether they are license numbers that belonged to you or not?

A. I believe this one here is, this 107 is.

Q. Sir?

A. This 57 P-107, I believe was my truck license number that year.

Q. 57 P-107?

A. That is right, one of them.

* * *

322

Q. And who, other than Clyde and Audrey Garner, Horace Twitty and Sammy Joe Garner, do you do that for, or did you do that for during the period after September 1, 1954?

A. Well, not anyone that I remember of.

* * *

324

Q. All right, I will ask you whether or not you ever made deliveries of large amounts of sugar to a 1946 black Ford coupe driven by Horace Twitty?

A. Yes.

Q. And whether or not on at least one occasion he was accompanied by Oren Cloud Fesmire?

A. That is right.

* * *

325

Q. I will ask you whether or not it is true that the latter part of '54 you were put on what we call order form?

A. That is right.

326

Q. —By the Government. And I ask you whether or not since that time it has been necessary for you to report such large wholesale sales of sugar to the Government?

A. That is right.

Q. Is that true?

A. That is right.

Q. And I will ask you whether or not that did not kind of put an end to a lot of this wholesale stuff?

MR. MURCHISON: I object to that. That is immaterial to any issue in this case.

MR. HODGES: Your Honor, I think it is competent to show the jury here that after being put on order by the Government, that the Garners quit buying these large quantities of sugar from this grocery store.

THE COURT: I will overrule the objection.

* * *

327

CROSS EXAMINATION

By Mr. Appleby:

* * *

332

Q. All right, do you know of any occasion at any time that you ever, of your own knowledge, know of delivering any sugar to Audrey Garner in any amount in any vehicle?

A. Well, that is the only time there that I told you about.

Q. That is the only time you are talking about, and you don't know that now, do you, you did not see it, did you?

A. Well, I did not go to the wholesale house. I will put it that way.

* * *

Q. All right, now, tell the Court and jury the occasion when you ever delivered any sugar to Clyde Garner?

333

A. Well, I told my testimony a while ago.

* * *

334

Q. Well, was he there, was he driving it or was he present?

A. Well, he was there.

* * *

337

Q. You would not say. Now, you say you have delivered sugar to Sammy Joe Garner. Was there any other occasion other than the occasion when you delivered this ton of sugar to him, Mr. Webb?

A. Was there any other occasion?

Q. Yes, or time, if that suits you better.

A. Not that I recall.

* * *

338

Q. Now are there any other of these defendants who are present here in court that you delivered sugar to any

time from September 1, '54, up to the date of this indictment?

A. No.

* * *

354

RECROSS EXAMINATION

By Mr. Appleby:

Q. I believe you testified that on one occasion Oren Fesmire—, you delivered some sugar to him?

A. No, I did not.

* * *

361

Frank Latham,

the next witness, having been first duly sworn, testified as follows:

* * *

Q. Where do you live, Mr. Latham?

A. Chester County.

Q. Chester County. Did you formerly live in Henderson County, Route 2, Henderson County?

(No answer)

Q. All right. All right, what kind of business have you been in for the past three years?

A. Farming and running a little mill outfit.

* * *

362

Q. During the first half of June of 1955, tell us whether or not you had occasion to sell Clyde Garner some cypress lumber?

A. What time?

Q. During the first half of June '55, did you have occasion to sell—

A. Well, now, it was some time in June.

Q. Some time in June, '55. All right, what did you sell him?

A. A little better than three hundred feet of lumber.

Q. A little better than three feet. What kind of lumber?

A. Well, I think most of it was cypress, now, there might have been some poplar.

* * *

363

Q. What was the dimensions of that cypress lumber?

A. It was six and eight inch lumber.

Q. It was six and eight inch lumber, that is wide. How thick was it?

A. It was about an inch thick.

* * *

365

J. D. Spellings,

the next witness, having been first duly sworn, testified as follows:

* * *

Q. Where do you live, Mr. Spellings?
A. 303 Monroe Street in Jackson.
Q. Jackson, Tennessee?
A. Yes, sir.

* * *

Q. Do you know Sammy Joe Garner?
A. Yes, sir.

* * *

366

Q. Do you know now one Horace Twitty?
A. Yes.

* * *

Q. Some time during October, '54, were you present when your son sold a '49 truck to Sammy Joe Garner?
A. Yes, sir.
Q. What kind of truck was that '49 truck?
A. Red one, '49.
Q. What model, Ford, International, —?
A. International.
Q. I ask you who all was present when your son sold that truck to Sammy Joe Garner?
A. Well, Mutt Garner, and Sammy Joe, and Twitty, and Doc Fesmire and Louis Fesmire.

* * *

367

Q. All right, what is the motor number of that '49 International truck that your son in your presence sold to Sammy Joe Garner, the defendant on trial here?

A. GPDC —, no, GPD 2 14389811.

* * *

377

George L. White,

the next witness, having been first duly sworn; testified as follows:

* * *

Q. What is your occupation, Mr. White?

A. Criminal investigator, Alcohol and Tobacco Tax, of the United States Treasury Department.

Q. All right, how long have you been employed by the Alcohol and Tobacco Tax Unit of the United States Treasury Department in that capacity?

A. Since August, 1954.

Q. Tell us whether or not you, in company—, or accompanied by other officers, assisted in the apprehension of an illicit distillery on or about March 16, 1955, in the Garnertown section of Henderson County, Tennessee?

A. Yes, sir, I did; but I believe the date was March 15th.

* * *

378

Q. All right. Tell us what you did there, Mr. White.

A. This distillery was located some quarter of a mile behind the Fesmire house.

* * *

379

Q. You went by the defendant, Oren Cloud Fesmire's house?

A. Yes, sir, that is right.

MR. HODGES: All right.

A. (Continuing) –And noticed several five gallon glass jugs sitting in the back yard.

MR. HODGES: I see.

A. (Continuing) –And we were proceeding on to the distillery and destroyed it, and returned to the residence of Oren Fesmire, and obtained consent to make a search of his premises, and in the outbuilding some twenty to thirty feet from the house we found ninety gallons of moonshine whiskey in unstamped containers, and eighteen five-gallon glass jugs.

* * *

381

Q. From whom did he rent these three rooms he lived in of the house?

A. He stated he rented from Clyde Garner and paid him eight dollars a month for it.

* * *

Q. I see. And what was in these rooms that were just used for storage, in these rooms that he did not rent, for storage room?

A. There was, I believe, an old washing machine, a tarpaulin, two still pumps and ten bags of charcoal, approximately forty–.

Q. What size bag of charcoal?

A. Forty pounds, forty pound bag.

* * *

382

Q. Where was this building? I thought you said it was a building out there you found ninety gallons of non-tax-paid whiskey in?

A. The building was located some twenty or thirty feet from the rear door of the house in what would be a back yard.

* * *

Q. And that was the building you found the ninety gallons of moonshine outside there?

A. That is right, also a stillhead and bottom.

Q. Now, while you were there and you observed all this, did any other defendants whom you see in the courtroom here come up?

A. Mrs. Garner came up.

* * *

384

Q. What kind of bottles were these ninety gallons of whiskey you broke in, in this little building shortly behind the house?

A. They were in eighteen five-gallon glass jugs.

* * *

CROSS EXAMINATION

By Mr. Murchison:

390

Q. And that is the same date he was indicted and convicted in this court, you know that, do you?

A. He was charged, of my own knowledge, I understand he was convicted here, yes, sir, but I was not present at the time he made his plea.

* * *

W. Lloyd Johnson,

next witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Joyner:

Q. State your name and occupation, please, sir?

A. W. Lloyd Johnson.

Q. And your occupation?

A. Clerk of the United States District Court for the Western District of Tennessee.

* * *

397

Q. I would like to direct your attention first, Mr. Johnson, to a bond, an appearance bond in the amount of one thousand dollars executed on March 15, '55, to secure the presence of Oren C. Fesmire.

A. March, 15th?

Q. Yes, sir, 1955.

A. Yes.

Q. Do you have that before you?

A. Yes, sir.

Q. Who show as sureties on that appearance bond?

MR. MURCHISON: We object to that, if Your Honor please.

THE COURT: On what ground, Mr. Murchison?

MR. MURCHISON: On the ground that it is not material to any of the issues in this charge, this conspiracy charge.

THE COURT: Objection overruled.

* * *

398

Q. Mr. Johnson, who show on there as sureties for the appearance of Oren Cloud Fesmire?

A. J. E. Mays and Mrs. Audrey Garner.

* * *

Q. And will you refer to your record there and tell me what property is shown by that as being owned by Audrey Hart Garner?

A. On this bond it is one hundred and twenty acre farm and a three hundred and eighty acre farm located in the Fifth District of Henderson County, Tennessee, value of twenty-five thousand dollars.

* * *

Q. All right, I would like you to get your record out now on a bond made August 14th, '55, – April 14, '55, – or is it on April 21, 1955, to secure the presence of Horace Twitty?

* * *

399

A. April 29th.

* * *

Q. Of '55. And who do you show as surety on that bond?

A. Mrs. Audrey Garner and Mrs. Brady Fesmire.

Q. And do you show any property there as being owned by Mrs. Garner?

A. It shows that her net worth was fifty thousand dollars, and that "I own four hundred and fifteen acres of land located in Fifth District of Henderson County, Ten-

nessee, said property is free and unencumbered, and has reasonable value of thirty-five thousand dollars."

Q. Now, do you have one there on August—, I think August 13th, 1955, for Henry Laverne Nix?

A. August 20, 1955.

Q. And who are the sureties on that bond?

A. Audrey Hart Garner and Leon Cantrell.

Q. And do you show property there owned by Mrs.

400

Garner?

A. It shows net worth forty-five thousand dollars, three hundred and eighty—, a forty acre farm and one hundred and forty-five acre farm valued at—, free and unencumbered with reasonable value of forty thousand dollars.

* * *

401

R. B. Blasingame,

the next witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hodges:

Q. You are Corporal R. B. Blasingame?

A. Yes, sir.

Q. Of the Tennessee Highway Patrol?

A. Yes, sir.

Q. Where are you stationed, Corporal?

A. Henderson.

* * *

402

Q. During the latter part of January, '55, tell us whether or not you had occasion to be at the "Y" Inn, which is located in Chester County Tennessee, and at that point ran into Clyde Garner?

A. Yes, sir.

Q. Did you have a conversation with him?

A. Well, not necessarily a conversation. I just went in there. That is the territory where I work.

MR. HODGES: I see.

A. (Continuing) —And I go in there pretty regularly, and I did go in there on one occasion, and I believe it was in January of '55, and just several in there standing around talking, and—

403

Q. Clyde Garner was one of them?

A. Clyde was there, yes, sir.

MR. HODGES: All right.

A. (Continuing) —And I don't know exactly how it came about, but I do remember that what was said was this. He said something about having some hard luck. I thought he actually was just joking, and to my own knowledge I don't know yet, but he did say he had put down two 35-sack pots somewhere in Decatur County on somebody else's land, on what he thought was somebody else's property, and it turned out to be TVA property, and some TVA official or someone had found it and left a note there or

sign that they wanted him to remove them within ten days, or something to that effect.

Q. What county was it in, do you remember?

A. I believe it was supposed to be in Decatur County.

* * *

410

Q. All right, now, tell us if on or about July 23, 1955, again at the "Y" Inn in Chester County, Tennessee, if you had occasion to have a conversation with Horace Twitty?

A. Yes, sir.

* * *

411

Q. Did you have such conversation with him as you have outlined?

A. I did have a conversation with him, and asked him if he had been in Memphis, and he said that he had.

Q. What did he tell you about that?

A. He told me he had been in Memphis on one of those occasions and had bought twenty-five jugs at Southern Specialty Company.

Q. What kind of jugs?

A. Five gallon glass jugs.

Q. Was anybody with him?

A. He said Clyde was with him.

* * *

412

Q. Where abouts in Memphis did he say he had bought these five gallon glass jugs?

A. He told me Southern Specialty Company. I don't know where the company is.

* * *

CROSS EXAMINATION

By Mr. Appleby:

415

* * *

Q. All right, now, you say back in January of 1955 at the "Y" Inn near Henderson, Tennessee, – is that the name of the place?

A. Yes, sir, that is the name of the place.

Q. –That you were present there when Clyde Garner made a statement about some stills?

A. Yes, sir.

Q. –Located on TVA property?

A. Yes, sir.

* * *

416

Q. Now, – well, just what were his exact words, Mr. Blasingame, to get it just exactly right?

A. Well, I will tell you, the best I recall, I thought at the time that he was just joking, and still don't know whether he was, but this was general conversation, so whatever was said was this, he just said that he had had some bad luck lately, that he had put down some 35-sackers, or 35-sack pots up in Decatur County, and had not much more than got them down until he had to move, that he had made a deal with some fellow up there to put them down

on his property, and the man misrepresented it to him, and he said that what was supposed to be this other man's property was TVA property, and the stills had

417

been discovered by TVA officials, and they had left a sign or note or something to that effect at the still site instructing him to move them within ten days.

* * *

Q. You were an officer at that time?

A. Yes, sir.

Q. And you were dressed in your uniform at that time?

A. Yes, sir.

Q. Now, on the occasion that you say Horace Twitty made a statement to you about purchasing five–, twenty-five five-gallon jugs from the Southern Specialty Company–

A. Yes, sir.

Q. (Continuing) –You were an officer at that time?

A. Yes, sir.

Q. And you were in uniform at that time?

A. Yes, sir.

418

Q. And he was aware of the fact that you were a member of the Tennessee Highway Patrol?

A. Yes, sir.

Q. And Mr. Garner was likewise aware of the fact that you were a member of the Tennessee Highway Patrol back in January when you claim that he made this statement?

A. Yes, sir.

* * *

427

Roy Bailey,

the next witness, having been first duly sworn, testified further as follows:

DIRECT EXAMINATION

By Mr. Joyner:

* * *

Q. Roy Bailey. Where do you live, Mr. Bailey?

A. Chester County.

Q. Sir?

A. Chester County.

428

Q. I will ask you, Mr. Bailey, whether or not a couple of years ago Mr. Clyde Garner came to your house to see you about a matter?

A. Yes, sir.

MR. MURCHISON: When was that?

MR. JOYNER: I will establish that, and if I don't you will have an opportunity to cross-examine him.

Q. I will ask you whether or not that was along the fall of '54?

A. Yes, sir.

Q. And what was the nature of the conversation that you all had then, what did he talk to you about, what did he tell you?

A. He said something about putting a still on—

429

MR. MURCHISON: Just a little bit louder. I can't hear you.

A. (Continuing) —Said something about putting a still on the place.

Q. What did he say about putting a still on your place?

A. He asked me about putting one there.

Q. These gentlemen are having trouble hearing you. Will you speak a little louder.

What was it that Clyde Garner said to you about a still on your place?

A. Well, –

Q. A little louder now?

A. He said he would make it worthwhile.

* * *

Q. And did you give him permission to put a still on your place?

A. No, sir.

Q. Now, subsequent to that, Mr. Bailey, I will ask you whether or not you found one or more stills on your land?

A. I did.

430

* * *

Q. And how many stills did you find?

A. Three.

* * *

Q. About a month. What did you do about these stills, Mr. Bailey?

431

A. Well, I went up to see Mr. Garner and asked him if–

Q. Went where?

A. Mr. Garner.

Q. Which Mr. Garner is that?

A. Clyde Garner.

* * *

Q. Talk louder, Mr. Bailey, so I can hear you. You say you went up to see him about—

A. The stills.

Q. What did you tell him, and what did he say?

A. I told him that if those were his stills I wanted him to move them off our place.

* * *

CROSS EXAMINATION

By Mr. Murchison:

* * *

433

Q. Then that would mean that these stills were located some ten or twelve miles from his home, is that right?

A. Yes, sir.

* * *

434

Q. Well, now, Mr. Bailey, were you a close friend of Clyde Garner's?

A. No, sir.

* * *

437

Q. You don't know whose stills they are, do you?

A. No, sir.

* * *

Q. Well, how did you know those stills were not there before Mr. Garner came to see it?

A. I don't know it.

* * *

440

Q. Do you remember what Mr. Garner, —, do you remember what Mr. Garner told you when you came up there and told him if they were his you wanted them moved, do you remember what he said about it?

A. Yes, sir.

Q. What did he say about that?

441

A. He said turn them in.

Q. He said turn them in, didn't he?

A. Yes.

Q. To the Law?

A. Yes.

Q. And that is what you did, wasn't it?

A. Yes.

* * *

Q. And after that you went down to Mr O'Neal Deming, the Sheriff of Chester County, and told him to turn some stills up there?

A. Yes, sir.

* * *

442

REDIRECT EXAMINATION

By Mr. Joyner:

Q. One thing I did not understand. Did he say the stills were not his, or did he say turn them in or did he say both?

A. He said they were not his and turn them in.

* * *

443

Roy White,

the next witness, having been first duly sworn, testified as follows:

* * *

Q. Where do you live, Mr. White?

A. 4792 Benning.

Q. Where is that?

A. Memphis.

* * *

Q. Mr. White, tell us whether or not during May '55, if you bought a used '51 Mercury from Gilmore Motor Company, Memphis, Tennessee?

A. I bought a '51 Mercury. I believe it was in May. I have got the papers on it and could tell you.

Q. It was not bought in your name, because you were not twenty-one, but your money was in the car?

444

A. Right.

* * *

Q. This is for the year '55 I am talking about, not '56. See if you don't see 2-96516 there?

A. It must be on here somewhere, but I can't find it.

* * *

445

Q. Now, I believe you are a nephew of Horace Twitty?

A. Yes, sir.

* * *

446

Q. Now, I have particular reference in regard to a Saturday morning, August 13th, 1955. Tell us whether or not your uncle, Horace Twitty, appeared in your home in Memphis at that time?

A. Well, I don't remember the exact date. I don't know if it was a Monday morning, or Tuesday morning, or Saturday. I don't remember the exact date.

Q. But sometime in August he appeared at your home?

A. Some time; I couldn't recall.

Q. '55?

A. Yes.

Q. And tell us whether or not he asked to borrow the '51 Mercury?

A. Yes, he wanted to borrow it.

Q. With this license number, just what I read off here?

A. My license.

Q. Registered in the name of Metzer, but it is your license, your car?

A. Yes.

Q. Did he say where he wanted to take the car, what he was going to do with it?

A. No, sir.

Q. You loaned it to him, didn't you?

A. Yes, sir.

* * *

Q. Where was your car sold, this '51 Mercury sold?

A. Here in Jackson, I believe it was here in Jackson, Tennessee.

* * *

451

Roy White,

said witness, upon being recalled to the stand, testified further as follows:

CROSS EXAMINATION

By Mr. Appleby:

Q. What type car was Mr. Twitty's car he left there with

452

you in Memphis?

A. He had a '47 Ford coupe.

Q. What color was it?

A. Black.

Q. Do you know what the motor number or license number was?

A. The tags, license tags started with—, it was from fifty-seven county.

* * *

Q. How long did it remain in Memphis, from what date to what date, if you recall?

A. Still there.

* * *

REDIRECT EXAMINATION

By Mr. Hodges:

455

Q. Now, look in the body of the statement, to refresh your memory, and see if you have in here the date you loaned your uncle, Horace Twitty, your '51 Mercury?

A. On Saturday morning, the 13th of August.

* * *

457

N. A. Robison,

next witness, having been first duly sworn, testified as follows:

* * *

Q. What is your occupation?

A. Tennessee Highway Patrolman.

Q. You are a Captain in the Tennessee Highway Patrol, aren't you?

A. Yes, sir.

Q. And where are you stationed, Captain Robison?

A. Huntingdon, Tennessee.

* * *

458

Q. Captain Robison, I want to direct your attention to an occasion on April 14, 1955, in Gibson County, Tennessee, and ask you whether or not, sir, you had occasion to make an investigation up there on that day?

A. I did.

* * *

459

Q. At that location, I will ask you whether or not some arrests were made there?

A. Yes, sir.

Q. How did it come about, please, sir?

A. We arrested Horace Twitty for possessing and transporting thirty gallons of white whiskey.

* * *

Q. And was he in a car or on foot, or how?

A. He was in a car with John Warren at the time we drove up there.

Q. What sort of automobile was it?

A. It was in a Pontiac.

* * *

460

Q. And where was the whiskey found, or was whiskey found?

A. It was found at John Warren's house.

Q. In John Warren's house?

A. Yes, sir.

Q. And was John Warren arrested also?

A. Yes, sir.

Q. Now, did you examine this Ford automobile?

A. Yes, sir.

Q. And what did you find in it?

A. Well, it had the back seat out, and had a blanket in there, and on the floor mat you could see the prints of some containers that had been sitting in there, and there was some whiskey had been spilled, just whiskey within five gallon glass jugs, and had cork stoppers, and one of these stoppers had a rotten place in it and you could see down where this whiskey would slosh out, and whiskey was on the floor mat of this car.

461

Q. Now, you gave us the license number; and I would like to ask you, sir, did you also get the motor number at that time, or did you examine the Ford automobile?

A. Yes, sir, we seized it.

* * *

Q. And I will ask you if you know of your own knowledge whether or not that car was returned to the possession of Horace Twitty?

462

A. Yes, sir, it was.

Q. All right, sir. Now, Capt. Robison, I would like to direct your attention to an occasion in August, particularly August 13, '55, when an investigation was made in the Bath Springs section of Decatur County. Were you present on that occasion?

A. Yes, sir.

* * *

Q. Incidentally, about what time of day or night was this?

A. It was somewhere around seven o'clock at

463

night, or maybe a little later.

* * *

Q. I see. And you had started into the gravel road leading into the place?

A. That is right, and we had gone about a mile, I guess, from this gravel road, went down a long hill and forded a creek, and when we come up this creek we started up a long hill, almost straight up.

MR. JOYNER: Yes.

A. (Continuing) —And when we got right almost to the top of this hill we met two cars coming out.

MR. JOYNER: Yes.

A. (Continuing) —So we jumped out, and they jumped out of the car and run, and we caught a fellow by the name of Nix, and Hood Luther and Horace Twitty run off.

* * *

464

Q. But Nix was arrested. Did you proceed—, incidentally, you stopped some vehicles there at that time?

A. We seized a '51 Mercury and a '47 Ford.

Q. Well, the '51 Mercury that you stopped, did you get the license number off of it?

465

A. Yes, sir, that is a Shelby County license number.

* * *

Q. All right. What about the Ford that was there?

A. I remember the license number on it.

Q. What color Ford was it?

A. Black Ford.

Q. And what kind of Ford was it?

A. It was the same Ford that I had seen and caught in Gibson County.

* * *

Q. What was that license number?

A. It had this number, 57-247.

* * *

476

Q. Captain, I overlooked to ask you to describe

477

the '51 Mercury automobile which was seized, and I would like you to examine the Exhibit 1 to Mr. White, and ask you whether or not that is a description of that car?

A. Yes, sir.

* * *

478

Q. Now, I wish, Captain, if you would, you would tell us a little more about the still down there on the river. How many pots were there?

A. Six.

Q. And what size were they?

A. The way we measured them, we guessed them to be a thousand gallon pots.

Q. One thousand gallon pots?

A. Yes.

Q. You guessed about it?

A. Yes, sir.

Q. Were there some fermenters around or was this the type still where you don't use them? I am not too well versed in them.

A. I don't know.

Q. Did it have any barrels around there?

A. No, sir.

479

Q. Was this the kind of still where they used barrels or did they ferment it in the pots?

A. Do the fermenting in the pots.

Q. Well, that isn't what you would call a pot still?

A. Yes, sir, I would call it a pot still.

* * *

480

* * *

CROSS EXAMINATION

By Mr. Appleby:

485

Q. And the Mercury was in the back. Now, do you know who was driving the Ford?

A. Hood Luther.

Q. Hood Luther. And who else would you say was in the car with him?

A. Nix.

* * *

487

Q. And you saw it was Twitty then?

A. And he took off down the road, and I couldn't catch him.

* * *

DEFENDANT'S PROOF

Oren Cloud Fesmire

* * *

498

DIRECT EXAMINATION

By Mr. Murchison:

* * *

Q. Were you indicted here on–, or were you indicted here in March of 1955?

A. Well, sir, I come down here to court in March of '55, but at that time my wife had a small child and was not able to work, and the lawyer I had, Mr. Terry Wright, talked to Judge Boyd, Honorable Judge Boyd there, and got off until June 20th, but my plea–, a guilty plea. I don't know whether they indicted me then, or whether they waited–.

Q. Well, you pled guilty on June 20th, then, did you, last year?

A. Yes, sir, but I pled guilty–, I told them in

499

March I was going to plead guilty.

Q. Well, that is when you commenced sentence?

A. Yes, sir.

Q. That is when you were sentenced, on June 20, 1955, is that right? Do you remember what sentence you got?

A. Eleven months, twenty-nine days, two hundred fifty dollar committed fine.

Q. Were you promptly taken away from here on that date?

A. Yes, sir.

* * *

500

Q. Now, Mr. Fesmire, you have heard the testimony of the witnesses here for the United States with respect to the possession on March 15, 1955, of ninety gallons of whiskey upon which the tax had not been paid. You have heard that referred to?

A. Yes, sir.

Q. Is it with respect to that violation that you were sentenced in June of '55?

A. Yes, sir.

* * *

501

Q. Well, was that your whiskey?

A. Yes, sir.

Q. Did any of these other defendants, that is, the Defendant, Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Sammy Joe Garner or Edd John Mayo have any connection with that liquor?

A. No connection whatever.

Q. What?

A. No connection whatsoever.

* * *

502

Q. Now, Mr. Fesmire, I believe it has been stated that a still was found in the rear of your place there. Did you hear that testimony?

A. Yes, sir, I heard the testimony.

Q. Were you connected with that still in any way?

A. I didn't know anything about it for about a week after I was brought down here and put under bond. They didn't say anything about it to me that they had found anything. In other words, sir, they were sitting there at my house when I come up, and they didn't leave, because they—

Q. I am asking you now, was that your still?

A. No, sir.

Q. Did you have any interest in the still?

A. No, sir.

Q. Do you know to whom the still belonged?

A. No, sir.

* * *

Q. Well, now, Mr. Fesmire, have you ever at any time bought any charcoal from any dealer in charcoal?

A. Yes, sir.

503

Q. When was that?

A. Well, I don't remember the exact date, sir. Well, I didn't exactly go to the dealer and get it.

Mr. Arnold Garner runs the "Y" Inn over here at Henderson. He would go buy charcoal, turn it over to me, and I barbecued chickens for him every Friday, and every Friday night he sold half-fried chickens, half-barbecued chickens, and barbecued shoulders, – anything else.

* * *

506

Q. Have you ever bought or used any charcoal in the manufacture of moonshine whiskey?

A. Yes, sir.

Q. What?

A. No, sir.

Q. I will ask you if you ever bought any five galion jugs or anything like that for it?

A. No, sir.

* * *

507

Q. Do you know Hood Luther?

A. No sir.

* * *

Q. Do you know Henry Laverne Nix?

A. No, sir.

* * *

Q. Have you ever – do you know James George Reves?

A. No, sir, I have saw him once or twice in this court.

* * *

508

Q. Have you ever had any business dealings or transactions whatever with Hood Luther, Henry Laverne Nix, or James George Reves?

A. No, sir.

* * *

509

Q. Let me ask you this. Did you ever have any business dealings with Edd John Mayo?

A. No, sir.

* * *

512

Q. During the time from September 16, 1954, until you were arrested in March, '55, did you operate any stills?

A. No, sir.

* * *

514

Q. Yes, sir. Now, then, were you ever engaged in making whiskey or in the employment of Horace Twitty at any time?

A. No, sir.

Q. Did you ever work for him?

A. No, sir.

Q. Were you ever on the same job as Horace Twitty any time?

A. No, sir.

Q. What?

A. No, sir.

Q. Did you ever work for Mrs. Audrey Garner?

A. No, sir.

Q. And I believe you say you never had any dealings at all with Hood Luther, Laverne Nix, or James George Reves?

A. No, sir, I don't even know them, sir.

* * *

520

Q. Your wife's car. If I understand you right, Mr. Fesmire, the only liquor that you have had any thing to do with was this ninety gallons, and that is the liquor that you have already been sentenced by this court and served the time for?

A. That is correct, sir.

Q. And that was a transaction in which you alone were guilty, is that right?

A. Yes, sir.

* * * *

523

Q. Well, to get it straight again for the benefit of the jury, did you ever go to John Webb's Grocery, or to John Webb or to the United Grocery, from whom he buys sugar himself, and buy any sugar?

A. No, sir.

* * *

Q. Were you ever up there in the company with Clyde Garner, or Audrey Garner, or Horace Twitty, or Sammy Joe Garner, or Edd John Mayo when they bought any sugar?

A. No, sir.

* * *

524

Q. Were you ever present when any whiskey —, I mean any sugar was hauled away from Mr. Webb's place of business there at Lexington?

A. No.

* * *

527

Q. Now, getting back to Mr. Webb's testimony, Mr. Fesmire, did you ever at any time buy any bran or anything like that from him?

A. No, sir.

* * *

528

Q. Yes, sir, but you never have bought anything like yeast, bran, meal, sugar, from him, is that what you say?

A. Yes, sir; that is right, never have.

Q. And you never have been along when any of these other defendants bought any?

A. No, sir.

Q. Did you ever help them haul any stuff like that away from there?

A. No, sir.

* * *

532

Q. Well, now, then, in your best judgment, from the place where these jugs were destroyed in which the sixty-three and a half gallons of whiskey was found, to Clyde Garner's house, how far was it?

A. It is four hundred and seventeen yards.

* * *

534

Q. Did you have any interest in the liquor at all yourself?

A. No, sir.

* * *

CROSS EXAMINATION

By Mr. Hodges:

536

Q. What kind of relations have you had with Garner, just business relations, or what, have you done business any with him?

A. No, just known them all my life, lived in the community there as neighbor.

* * *

537

Q. What kind of business is Audrey Garner in?

A. Not any as I know of, after they quit the grocery business, only farming. They make a crop every year.

* * *

538

Q. One thing I could not quite get straight in my mind here, you did not rent that part of the house

539

where the charcoal was stored, and yet you try to tell us that part of the house, that charcoal was yours in there.

A. It was my charcoal in there

* * *

542

Q. And when you came along in this truck that day with Sammy Joe, when Sammy Joe's truck was parked by the side of the house with the sugar in it, you knew it was Sammy Joe's truck, didn't you?

A. No, sir, I did not come by in a truck. I come

543

by in a car pulling a truck.

* * *

544

Q. Just prior to going on the stand, Mr. Fesmire, did any of the other defendants ask you here in effect to take the rap for them?

A. No, sir, never.

Q. Wouldn't do anything like that?

A. No, sir.

Q. Who is on your bond?

MR. MURCHISON: Now, I want to ask, if the Court please, for a mistrial on that. That is a baseless insinuation

against these other defendants, and highly prejudicial to them to make that sort of a statement in the presence of this jury.

MR. JOYNER: That is about the same–

MR. MURCHISON: (Continuing)–And reflects upon every one of these defendants.

THE COURT: That is not grounds for a mistrial, Mr. Murchison. The District Attorney is within his rights to ask the question, and the witness denied it, and that ends it.

* * *

551

Q. Were you at that time connected with Mrs. Garner in any way in the liquor business?

A. No, sir.

* * *

559

Clyde Eugene Garner,

the next witness, having been first duly sworn, testified as follows:

* * *

560

Q. Are you married, Mr. Garner?

A. Yes, sir.

Q. Is Mrs. Audrey Hart Garner your wife?

A. Yes, sir.

Q. Now, do you have any children?

A. I have three.

Q. You have three children. What are their ages?

A. The oldest one is –, she is twenty years old, twentieth the third day of April. The other one is sixteen.

Q. Is that a boy?

A. They are all three girls.

Q All three girls. The other sixteen?

A. The middle child is sixteen. The youngest one is six.

Q. The youngest one is six years of age?

A. Yes, sir.

* * *

564

Q. Now, Mr. Garner, I want to ask you preliminarily, have you ever been convicted of violating the law in this court before?

A. Yes, sir, I was convicted, I don't know, I believe it was in September of 1950.

Q. Well, in this court?

A. Yes, sir.

Q. Well, have you been convicted on any previous occasions in this court?

A. Previous to that?

MR. MURCHISON: Yes.

A. Yes, sir.

Q. Well, when, if you know about when, in your best judgment?

A. I was convicted in 39, and I was convicted in '40.

Q. '39 and '40 and 1950?

A. 1950, yes, sir.

* * *

565

Q. (Continuing)–All during the trial of this case. You have heard the witness from the Forest Products Chemical Company–

A. Yes, sir.

Q. (Continuing)—Testify that you had been in that place of business?

A. Yes, sir.

Q. Now, I am referring to a negro witness, — and that you had been there and purchased some charcoal on one or more than one occasion. Have you ever bought any charcoal from that place?

A. I have never bought any charcoal there. I don't even know where the place is at.

Q. Have you ever been to the place?

A. Never have been to the place, don't even know where it is, and fact of the business, I can recall that I have been, since that conviction, I have been in Memphis three times.

* * *

— 567

Q. Now, Mr. Garner, it is alleged in this indictment that you were with Horace Twitty on September 1, 1954, and that you commenced buying five gallon bottles from the Southern Specialty Company in Memphis after that day. You say that is not true?

A. It is not true.

Q. All right. Now, Mr. Garner, there has been some proof introduced here that sixty-three and a half gallons of whiskey upon which the tax had not been paid, was found in a cache at the rear of your home in Henderson County.

A. Yes, sir.

Q. Do you know anything about that whiskey at all?

A. No, sir, I don't know anything about it. I don't—

Q. Was it yours?

A. No, sir. I know that had been—

Q. To the best of your knowledge, did it belong to your wife?

A. No, sir.

Q. What?

568

A. No, sir, it was not on our property.

* * *

570

Q. Now, Mr. Garner, I will ask you if, since September 1, 1954, any whiskey has been found in or around your home?

A. No, sir.

* * *

574

Q. Well, let me ask you this. You heard the witnesses for the Government, Mr. Adkins, and I believe his wife, say that you were up there some time – let me see the date, in April, I believe, of 1955, – no, just a moment. I believe that is wrong,–

575

in August of 1955, that you were up there in that community and talked to them. Did you talk to them, sir? That you had some business dealings back in April '55, with Mr. and Mrs. Adkins?

A. Yes, sir, that is right.

Q. Were you up there?

A. Yes, sir.

* * *

Q. (Continuing)–I am talking about back in August of '55, that you came –, you heard them talk about you were up there with Hood Luther and Nix and Reves and some other, do you remember that testimony?

A. Yes, sir.

* * *

577

Q. Mr. Garner, you heard one of these two witnesses say, and maybe both of them, that you were up there with Hood Luther back in August, I believe, of '55. Do you recall any such trip as that?

A. No, sir.

Q. What?

A. No, sir.

Q. Were you up there with Hood Luther?

A. No, sir.

Q. What?

A. No.

Q. At any time?

A. No, sir.

* * *

578

Q. Well, were you up there, did you have any interest in any still or stills?

A. No, sir, did not.

Q. —In Decatur County?

A. I did not have any interest in no stills.

Q. Now, Mr. Garner, do you know Clarence Adkins, her husband, or did you know him in August?

A. No, sir.

* * *

579

Q. Now, he testified that you were at his place, – I mean Mr. Clarence Adkins, that in June, '55, – were you at his home at that time?

A. No, sir.

Q. Did you say anything, you and Hood Luther, to Mr. Clarence Adkins about putting a still up there?

A. No, sir.

Q. Did you have any such conversation with them at all connected with a still back in June, '55?

A. No, sir.

Q. Or any time back in '55?

A. No, sir, I did not.

580

Q. Well, I will ask you if you have any knowledge at all of any of the facts or details of the operation of any stills in that community around Bath Springs?

A. No.

Q. Now, Mr. Garner, it was testified by either Mrs. Adkins or Mr. Adkins that you came up there some time the first part of August, I believe it was, or something like that, before the investigation on the 13th, I believe, and that you came up there and got a load of whiskey.

A. I never went there and got no whiskey, and when he testified that I went there and got the whiskey I was in the Smoky Mountains.

Q. You were in the Smoky Mountains?

A. Yes, sir.

Q. Incidentally, in that connection do you know when you went to the Smoky Mountains?

A. Yes, sir.

Q. When?

A. I imagine it was on Tuesday morning. It was the 11th or 12th, I believe it was for sure on the 11th or 12th, but I left out on a Tuesday morning

581

of that week.

MR. JOYNER: 11th or 12th of what week?

Q. Of what month?

A. August.

Q. August?

A. Yes.

Q. Did you have anyone with you on that occasion?

A. Yes, sir.

Q. Who?

A. Lloyd Jones, a friend who works at Milan and had his vacation.

MR. JOYNER: And who?

A. Lloyd Jones.

MR. JOYNER: And who?

A. A friend, Ernest Garner, a retired employee—

* * *

583

Q. Yes, sir. Now, when did you get back to Garnertown from that trip?

A. I got in a Friday night.

Q. What day of the month?

A. I believe it was 13th.

Q. 13th?

A. Yes, sir, 13th or 14th.

Q. 13th or 14th?

A. Yes, sir.

Q. Of August?

A. That is right.

* * *

584

Q. You heard Mr. Bailey state that you had come to him in the fall of '54 and asked for your permission to put a still on his place —, I mean, for his permission, that you asked him for his permission to put a still on his place?

A. Yes, sir.

Q. Is that true?

A. No.

Q. Do you know the man?

A. Now, parts of that, Bailey did —, I don't know when the time was, but Bailey did —, he exaggerated some of those things.

Q. Well, just tell us what happened?

A. All right. Bailey, I always gave him credit for being, you know, a fine boy, and he did discuss putting a still down there and going in the liquor business himself, and I advised him to stay out of the liquor business, yes sir.

Q. He talked to you about going in the liquor business himself and you advised him not to?

A. Yes, sir, I advised him he was too fine a boy to go in the liquor business.

MR. JOYNER: You advised him what?

A. He was too fine a boy to go in the liquor business.

MR. JOYNER: Um'hum.

Q. Mr. Garner, I ask you if, after that you located a still or more than one still on his farm, or had any connection with any stills being found on his farm?

A. I did not quite get it, Mr. Murchison.

Q. I ask you if you at any time placed any stills on Roy Bailey's farm?

A. No, sir, I did not have any connection with any still on Roy Bailey's farm.

Q. Did you know anything about any stills being down there?

A. No, sir, I did not know anything about any stills being down there.

Q. Let me ask you if some time after you had

586

talked —, after he had talked to you about going in the still business, if he did come back to you and say something about some stills being found on his farm?

A. Yes, sir.

Q. What?

A. No, wait a minute.

Q. Or do you remember?

A. Really what he talked about, that there was some stills down there, and I told him to go turn them up, if there was any stills down there, or something.

Q. You told him to turn them in to the sheriff?

A. Yes, I think he talked to me about it. I am positive he talked to me about it; he said that there were two stills down there; I told him if there were any stills on his place to, you know—

Q. Go turn them in to the sheriff?

A. Yes, sir.

Q. All right, sir, did you have anything to do—

A. No, sir.

Q. (Continuing) —Directly or indirectly with any stills there, that had been there, or ever been there?

587

A. No, sir.

* * *

Q. Do you know Corporal R. B. Blasingame?

A. Yes, sir.

Q. You were present when he testified yesterday, weren't you?

A. Yes, sir.

Q. Now, you heard him say that he met you at the "Y" Inn down near Henderson?

A. Yes, sir.

Q. In January, 1955?

A. Yes, sir.

Q. And that on that occasion you made the remark to him that you had put in two 35-sacker pot stills on somebody else's land, or something to that effect. Did you ever make any statement like that?

A. No, sir, I never made any statement like that.

* * *

588

Q. And did you ever discuss with him either then or any time later that anything about putting two 35-sacker pots on land and finding out later it was on TVA land?

A. No, sir.

Q. What?

A. I never did.

Q. Have you ever put any stills on TVA—

A. No, sir, I never put any stills—.

Q. Well, now, let me ask you this, Mr. Garner. At any time during January of '55, or thereabouts, while Blasingame was present, did you make any statement like that in his presence or in his hearing?

A. No, sir.

* * *

Q. Do you know where Brodies' Landing is, or maybe you call it Broadies' Landing, up on the Tennessee River?

A. Broadies' Landing?

MR. MURCHISON: Yes.

A. Yes, sir.

Q. What type of place is that up there?

A. Broadies' Landing?

Q. Yes, is it a restaurant, or a fishing hole, or what is it?

A. Yes, sir, it is a fishing camp, and—

Q. Have you ever been up there?

591

A. Yes, sir.

Q. I will ask you if you have ever had any stills–

A. No, sir.

Q. (Continuing)–Located in that area?

A. No, sir.

Q. Huh?

A. No, sir.

Q. How far would that be from your home anyway, Mr. Garner?

A. I would kind of have to calculate a little.

Q. Just by your best estimate.

A. Well, be eleven miles from my home to Lexington, about sixteen miles from there to Paris, about sixteen from there to Paris, and then I would say it would be about eighteen or nineteen, I guess, the best way I could figure it, between sixteen and nineteen miles from Paris to Brodies' Inn.

Q. In other words, that would be about forty-four miles from where you live?

A. Yes, sir.

* * *

592

Q. Do you recall or did you hear or learn of ninety gallons of whiskey being found up there near Oren Fesmire's home, and him being indicted for it?

A. Yes, sir.

Q. And serving time, you heard about it?

A. Yes, sir.

Q. Mr. Garner, did you have any interest in that?

A. No, sir, no, sir.

Q. Did you know it was there?

A. No.

* * *

Q. Did you have any jugs or charcoal or anything in that house up there?

A. No, sir.

* * *

Q. (Continuing)—A Mr. Frank Latham of Chester County, do you know a Frank Latham?

A. Frank Latham?

Q. The witness who was here yesterday.

A. Yes, sir, he runs a sawmill.

Q. And you know him and he knows you, is that right?

A. Yes, sir.

Q. Have you bought any cypress, or did you buy any cypress and poplar, or lumber from him along about June of last year?

A. Well, yes, sir. I don't know whether it was cypress, now, or Poplar. It was kind of soft wood.

Q. Kind of soft wood?

A. Yes, sir.

Q. I believe he said it was something like three hundred feet. Do you recall how much you bought from him?

A. It was – you know, he figured out the planks that was –, I believe about three hundred and ten feet, but he counted three hundred and ten or twelve feet that he figured out, but he let me have it for three hundred feet.

Q. Do you know what became of that cypress and poplar then?

A. Yes, sir.

Q. What?

A. Well, sir, some of it –, some of it I made some hog troughs out of, and some of it I let my brother have to make some hog feeders out of.

595

Q. Mr. Garner, I believe it was testified here by the officers, Ralph Lumpkins, I think he is the principal one that he made a search of an old outhouse of yours which he says was about a mile, I believe, from where you live, and then in it he found some fertilizer and a stillhead or possibly two stillheads. You heard that testimony, did you not?

A. Yes, sir.

Q. Do you know where that outhouse he has described is located?

A Yes, sir, I sure do.

Q. How far was it from where you live?

A. Well, it is –, it would not miss two miles over a tenth or two-sixteenths.

Q. A good ways over there, though?

A. Yes, sir.

Q. Do you know whether you kept it locked up or not?

A. Yes, sir.

Q. Huh?

A. Yes, sir.

Q. Well, now, why?

A. We did not keep it locked up until we bought

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about one hundred and eighty or something. I don't know just exactly how many sacks of fertilizer, one hundred and eighty some-odd sacks of fertilizer. I know it run into right smart of little money. And we had it locked for the purpose that we had this fertilizer in there, and about two years –, I mean, the reason we had it locked, about two years ago I lost twenty sacks of ammonia, and I never did hear tell of it.

Q. So, after you got this hundred and eighty sacks, you put a lock on it, is that right?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. I ask you, Mr. Garner, you heard Mr. Lumpkins state that after, I believe he said one or possibly two stillheads he found, I am not sure about that.

MR. JOYNER: Two.

MR. MURCHISON: Two?

MR. JOYNER: Yes.

Q. (Continuing)—Stillheads, what he called stillheads, a round circle, – some boards made a circle, – kind of disc, – you know what a

disc is, that is a round thing like a dollar?

A. Yes, sir.

Q. Was that yours?

A. No, sir.

Q. What?

A. No, sir.

Q. Do you know how it happened to be there, or have you got any knowledge of it at all about the discs, about what he calls stillheads.

A. Call stillheads?

Q. Yes, what Mr. Lumpkins calls stillheads.

A. Well, what he calls stillheads, I would call a table top or something, you know, I would call what he called a stillhead a table top.

Q. Have you made any stillheads, or owned any stillheads at that time?

A. No, sir. And what they say over there, an old man, an old bachelor of World War I proceeded to make, sir—

MR. JOYNER: May it please Your Honor, we object unless the witness names the man.

MR. MURCHISON: Well, name him.

A. Bruce Odle.

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MR. JOYNER: Who?

A. Bruce Odle.

MR. JOYNER: Bruce who?

A. Odle. Some calls it Odell and I call it Odle.

Q. Go ahead, explain, if you can, what was there, if you know what the facts are about it.

A. Well, you know, what they call stillheads was where he proceeded to make his brother a table, just a round table, and I went over there and seen what they call the stillheads. It wasn't nothing to it, just a table top was all I could see, just a—

Q. You know what a stillhead is, if that is a stillhead, sir, – have you ever seen one before?

A. Well, I would say this. Probably you could maybe constitute a still out of it, if you want to. They are talking about these Alabama stills and things like that. However, your know, – but this old man built that for a table top.

* * *

Q. A round circle. Was it yours?

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A. No, sir.

* * *

602

Q. Well, now, Mr. Webb was here yesterday, I believe, and testified by way of an estimate that he sold you some sixteen thousand pounds of sugar in four months period.

commencing September 1, 1954, and up until January 1, 1955. State whether or not that is correct.

A. I never bought a sack of sugar from John Webb in my life.

Q. I mean, either as a merchant or –

A. Either as a merchant, you know, when I was a merchant. I sat here and hear this testimony yesterday, and I never bought a sack of sugar from John Webb in my life.

* * *

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Q. Now, Mr. Garner, did you ever authorize or instruct any of these other persons, that is, Audrey Garner, Horace Twitty, Sammy Joe Garner, Edd John Mayo, or any of the other defendants to go up there and buy any sugar from John Webb?

A. No.

Q. –The merchant that testified here yesterday?

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A. That is right, no sir.

Q. Do you know Mr. Hooper Fiddler?

A. Hooper Fiddler?

MR. MURCHISON: Hooper Fiddler?

A. Yes, sir.

Q. I will ask you, this may have been covered by another previous question, – did you ever send anybody up there to buy any sugar and bran from him?

A. No, sir.

Q. Or from the U-Tote-Em Company?

A. No, sir.

* * *

Q. Did you give a check to anybody that later showed up at the U-Tote-Em Grocery Store?

A. Yes, sir.

* * *

605

Q. Did you send that check to him or deliver it to him for the purpose of getting sugar and bran?

A. No, sir.

Q. What?

A. No, sir.

Q. What did you start to say?

A. I signed that check. Me and him —, me and the colored fellow there, I furnish him pigs, been in it for at least three or four years, and I have

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got a bunch of brood sows out on the farm, and he hauls slop around town, he goes around and picks up this slop. I furnish the pigs and he hauls the slop and feeds out to the pigs, and gives me half of it. He gives me half of it.

Q. Did you authorize him to go buy sugar?

A. No, sir. He was going to buy three brood sows. He knew where he could buy three brood sows at a bargain. That is, you know, so much—, a bargain. He said it was real good sows. He is a good hog man. He knows, you know, good.

Q. Did you ever receive this sugar?

A. No, sir.

* * *

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Q. Mr. Garner, have you at any time ever entered into any agreement with these defendants who are named in this indictment to make whiskey?

A. No, sir.

Q. Or sell whiskey?

A. No, sir.

Q. Or to transport whiskey?

A. No, sir.

Q. Or to possess whiskey?

A. No, sir.

* * *

608

Q. Let me ask you this. What, if anything, is the extent of your acquaintance with –, or was the extent of your acquaintance prior to this indictment with Henry Laverne Nix?

A. Prior to the indictment?

MR. MURCHISON: Yes.

A. I did not know him.

* * *

Q. Before this indictment, what was the extent of

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your acquaintance with James George Reves?

A. Before the indictment?

MR. MURCHISON: Yes, sir.

A. Now, I am not for certain whether I ever knowed Reves or not, but it seems like –. I don't know, but it seems like Reves is –, that I may have seen him, now, Reves, I think, but I am not positive about it.

Q. Have you ever had any business dealings with him?

A. No, no dealings at all, no, sir.

Q. When, prior to this indictment which was returned, I think in March, did you get acquainted with, if you ever did, with Hood Luther?

A. I never got acquainted with him.

Q. Do you know him now?

A. No, sir.

Q. Now these other defendants that are named in there, Audrey Hart Garner, of course that is your wife?

A. Yes, sir.

Q. And you have, of course, known her. And Sammy Joe Garner is your nephew, is that right?

A. That is right.

* * *

610

Q. Now, defendant Horace Twitty, have you and he ever got together to make whiskey?

A. No, sir.

Q. Distill whiskey?

A. No, sir.

Q. Transport and sell it, anything such as that?

A. No, sir.

Q. Are you and he engaged in that business together?

A. No, sir.

611

Q. What?

A. No, sir.

* * *

Q. Now, Mr. Garner, do you own any motor vehicles, or did you own any in September in 54?

A. September?

Q. Automobiles, trucks, or anything?

A. Of 1954?

Q. Yes, sir, during the period of this indictment,—

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I don't know whether it has been very carefully explained to you.

A. Yes, sir, I owned, I believe it was a '53 at that time. I believe it was '53 Chevrolet.

Q. A '53 Chevrolet?

A. Yes, sir.

Q. Did you own any trucks?

A. No, sir.

Q. I mean from –, let me get this period for you, – from September 1, '54, until this indictment was returned in March of '56 did you own any trucks?

A. No.

Q. Did you have any in your custody and possession?

A. No, sir.

• • •

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CROSS EXAMINATION

By Mr. Joyner:

Q. And you farm how much land in Henderson County?

A. How much land in Henderson County?

MR. JOYNER: Yes.

A. Well, I had –, let's see, get it all straight, – I had, me and one of the croppers had fifty-one and a half acres of cotton, '55, last year. We have fifty-one and a half this year, and about twenty or twenty-five acres in corn.

• • •

615

Q. Yes, how much farm land? You know, land, how much?

A. Yes.

MR. JOYNER: Yes.

A. Around four or five, about five hundred.

Q. Five hundred acres?

A. Yes, sir.

Q. Is it farm land?

A. Yes, sir.

Q. Pretty good farm land?

A. Yes, sir.

Q. Is that in your name?

A. No, sir.

* * *

619

Q. Well, has she conveyed some of it to her father in the past year?

A. No, sir.

Q. She has not?

A. No, sir.

Q. In other words, every acre of land which she owned a year ago, she still has, except the four and a half acres, is that right?

A. That is right.

Q. Sir?

A. That is right?

Q. What would you estimate as the value of that five hundred odd acres?

MR. MURCHISON: I object, if Your Honor please, to that. I think this is going far afield. This has nothing to do with this conspiracy here at all.

MR. JOYNER: I think it has a lot to do with it.

MR. MURCHISON: No.

THE COURT: What is the materiality of it? I don't quite get it.

620

MR. JOYNER: The contention of the Government about this matter, if Your Honor would like me to state it in the presence of the jury at this time, — I think it would be proper for me to approach the bench a moment.

MR. MURCHISON: Yes, I would like to know.

THE COURT: Well, come around, let's see what—.

(The following occurred at the bench, and out of the hearing of the jury:)

MR. JOYNER: Our contention about this matter is and has been that actually Audrey Garner is not only the financier but the brains of this outfit, and we think we are entitled to go into it. As of now we don't know whether she is going on the stand or not, and if we are going to develop it, we necessarily must develop it by cross-examination of this witness, and—

MR. MURCHISON: And that is not material

621

to the issue.

MR. JOYNER: It is our further contention—

MR. MURCHISON: I don't think it material to what he is charged with, and—

THE COURT: I think it is material, Mr. Murchison.

MR. MURCHISON: (Continuing)—To prove the wealth of the defendant.

THE COURT: Usually the husband is considered the head of the house and the women in the house are more or less under his domination. But there is evidence in the record here that defendant, Audrey Garner, is a person who has a say about things around the house, and she has – the bank account seems to be in her name, and among other things, – so I think the Government is entitled to develop that situation. The objection is overruled.

* * *

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Q. Mr. Garner, I was about to ask you what the valuation of that five hundred acres of land was.

A. Well, I wouldn't know what the valuation is. It would –, it would range—

Q. Sir?

A. I wouldn't really know. I guess maybe twenty-five or something thousand dollars. I wouldn't know. Some people might not value it over fifteen. I wouldn't know what the value is.

* * *

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Q. And you say a cousin owns the "Y" Inn. That is the one that uses all the charcoal, fixes the chickens that Mr. Fesmire cooks?

A. Yes, sir.

Q. That is the same, isn't it?

A. Yes, sir.

Q. And every Friday he uses up a lot of charcoal to cook chickens down there, because he has got a big business, that is the same one?

A. Yes, sir, he has got a big business.

Q. Big business?

A. Yes.

Q. Charcoal broiled chickens, and barbecued

631

chickens down there?

A. Yes.

Q. And it just takes a truck load of charcoal to cook some chickens for the "Y" Inn? Sir?

A. That is right. It does not take a truck load, but he buys it by the truck load.

* * *

634

Q. Yes, sir. Yes. Is there a fellow staying over there named Rothschild, Rothschild?

A. Rothschild?

Q. Yes, Rothschild?
A. No, sir, not as I know of.
MR. APPLEBY: That is the name, Mr. Joyner?
MR. JOYNER: Rothschild, R-o-t-h-s-c-h-i-l-d.
Q. Do you know Mr. Rothschild?
A. No, sir.
Q. Do you know a Mr. Bill Pegram?
A. Yes, sir.
Q. Does he stay over there some of the time?
A. No, sir.
Q. Where does he live?
A. He lives in Memphis.
Q. Is he the one driving that robin egg blue Cadillac?
A. Driving what?
Q. Robin egg blue Cadillac automobile?

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A. I have never seen him in a Cadillac.
Q. What kind of car have you seen him in?
MR. MURCHISON: If your Honor please, I object to that. This is something that is extraneous to this lawsuit, as I see it.
MR. JOYNER: We will pass it if they object to it.
MR. MURCHISON: I have never heard of Rothschild.

* * *

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Q. Let me ask you this. What about this fellow Adkins, have you known him very long?

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A. Adkins, Clarence Adkins?
MR. JOYNER: Yes.
A. Yes, sir.

Q. Then you have known him?

A. I haven't known him very long, not since I got involved in this, and they whipped him up and made him sign a statement against me.

Q. Oh, did they whip him up and make him sign a statement against you?

A. Yes, sir.

Q. Well, did you get him to sign a statement for you, too?

A. Yes, sir.

Q. I wonder if you would let me see the statement he signed for you?

A. The attorney has got it.

Q. I wonder if you wouldn't ask them to let me see it?

A. Has he got it or not? If he has got it, I certainly wouldn't mind letting you see it.

* * *

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Q. Are you the same Clyde Garner who in '38 was sentenced to three months for violation of liquor—?

A. No, sir, I am not the same Clyde Garner.

* * *

666

Lloyd Jones,

the next witness, having been first duty sworn, testified as follows:

* * *

Q. Where do you live, Mr. Jones?

A. I live at Huron.

Q. Is that in Henderson County?

667

A. Yes, sir.

* * *

Q. Do you know the defendant, Clyde Eugene Garner?

A. Yes, sir.

* * *

Q. What time in '55 did you take that vacation, Mr Jones?

A. Well, it started on about the 8th of August.

Q. Do you know what day of the week the 8th of August came on?

A. On Monday.

Q. Did you go any place on your vacation?

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A. Yes, sir.

Q. Where did you go?

A. Smoky Mountains.

Q. Were you accompanied by anyone?

A. Yes, sir.

Q. Who?

A. Clyde Garner, and Ernest Garner.

* * *

Q. And leaving from Henderson County, where did you go first?

A. Went to Chattanooga first.

Q. And how long did you remain in East Tennessee?

A. Well, we stayed down there one night.

Q. And where did you go from there?

A. On into the Smokies.

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Q. How long did you remain up there?

A. Well, we got there –, stayed there until on the 12th, come back the 12th.

Q. And you returned home on the 12th?

A. Yes, sir.

Q. And what time of day did you get home on the 12th?

A. It was dark, or right after.

Q. Do you know what day of the week the 12th was?

A. It was on Friday.

Q. On Friday, the 12th. Was Mr. Garner with you during all of that time?

A. Yes, sir.

* * *

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Riley Garner,

the next witness, having been first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

By Mr. Appleby:

Q. Mr. Garner, where do you live?

A. I live up near Huron.

Q. And what kind of business are you in?

A. I run a store up there.

Q. Are you also a farmer, do you farm any now?

A. I farm, I have my land cultivated.

Q. Are you related to the defendant, Clyde Eugene Garner?

A. Yes, sir.

Q. Younger brother?

A. Yes, sir.

* * *

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Q. Mr. Garner, have you, at my request, made some measurements up there with reference to the house of Clyde Garner and a place where some liquor was destroyed back in the woods some distance west of his house?

A. Yes, sir, I did.

* * *

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Q. Now what method did you use, Mr. Garner, in making these measurements which you have made?

A. We used a fifty foot steel measure.

Q. You say "we", who measured it?

A. Me and Bud Williams and Bill Garner.

* * *

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Q. Will you state, Mr. Garner to the Court and jury the distance from the back of Mr. Garner's house to the place where the liquor was destroyed back there?

A. Well, it is about four hundred and seventeen yards, I believe it was.

* * *

Q. Is there still evidence there of barrels, or busted jugs or glass and stuff like that?

A. Yes, sir.

* * *

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Motion for Mistrial

MR. MURCHISON: May it please Your Honor, the defendants, and each of them, respectfully move the court than an order of mistrial be entered in this case for the following errors committed upon the trial and during its progress:

First, it was improper and prejudicial to these defendants for the Government to have introduced any evidence whatsoever with respect to

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the finding or location of whiskey in the building near the "Y" Inn in Chester County, Tennessee, and this was prejudicial to the defendant and grounds for mistrial, notwithstanding the Court's instruction to the jury, as I recall it, to disregard that evidence.

Second, because it was improper for the counsel for the Government to state or ask the defendant Oren Fesmire on cross-examination if he had not been induced to take the rap for the other defendants since the commencement of the trial of this case.

Third, it was erroneous and improper and grounds for a mistrial that the Government witness, Ralph Lumpkins, testified first that in making a search of the premises of the defendants, Clyde Eugene Garner and Audrey Garner, that he had in his possession a warrant for the arrest of Horace Twitty, which was thereafter corrected by him on the stand to state that he had knowledge of the existence of a warrant for the arrest of Horace Twitty on a charge pending against him in the State of Alabama. This was prejudicial because, regardless of the validity of the search it was erroneous and improper, and grounds for a

Motion for Mistrial

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mistrial for the Government to prove the pending prosecution against the defendant Horace Twitty.

Fourth, because of the statement made by Government's counsel while the Government witness Adkins was on examination as a witness in this case, that they believed that he had been paid to say that he had been beaten by the officers, since the Government did not thereafter attempt to show by any proof whatever that such an act had been committed, or that he had been offered anything.

* * * *

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THE COURT: Well, the motion for mistrial is denied.

Motion to Disregard Evidence

MR. MURCHISON: Very well, then, may it please your Honor, the defendants, and each of them, respectfully move the Court that the jury be instructed to disregard all of the evidence introduced upon the trial of this case touching the following propositions:

First, all transactions including the sale and purchase of sugar alleged to have been made prior to September the first, 1954.

* * *

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THE COURT: All right, the Court thinks that particular piece of evidence is properly admitted.

* * *

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MR. MURCHISON: Yes, sir. Now, if Your Honor please, the defendants, and each of them, move the Court that the jury be directed to disregard all the testimony with regard to the stills found at or near or within the Bath Springs community, on the ground that there has been no evidence introduced here to connect anyone of these particular defendants who are now on trial with those stills.

* * *

THE COURT: Well, there is much evidence

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in the record that at least two of the defendants on trial were in and around there, and that at least one of them was seen carrying or moving contraband liquor from that place. And there is evidence that other defendants not now on trial, — Nix and Reves, and one or two others, were very active in and around the still found there. So the Court thinks that evidence is properly in the record.

* * *

MR. MURCHISON: And then defendants respectfully move the Court that the jury be instructed to disregard all the evidence with respect to the intoxicating liquor located to the rear or back of the Garner home, as set forth in one of the overt acts of the indictment, — I believe it is overt act number 2.

* * *

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THE COURT: All right, what else, then, gentlemen?

* * *

Motion to Disregard Evidence

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MR. MURCHISON: Well, I have got several others, Your Honor. Now, two or three other matters that we think we are entitled to.

Your Honor, the defendants respectfully move the Court that the jury be instructed to disregard all the testimony with respect to the intoxicating liquor found in the home of Oren Cloud Fesmire, — that is, at his home, — that is overt act number 7, — because under the undisputed proof in this record, and there is no contradiction about it, that was the whiskey that belonged to Mr. Fesmire, and with regard to the possession of which he pleaded guilty and was sentenced in this court.

* * *

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THE COURT: Well, Mr. Fesmire was pretty much in evidence all around there when all these things were happening, and I don't think the record should be disturbed as to that particular phase of it.

* * *

MR. MURCHISON: The defendants respectfully move the Court that the jury be instructed to disergard all of the evidence and testimony with respect to the contents of a car in which the defendant Twitty was—, which defendant was driving and operating in Gibson County, as there is no evidence here to connect that operation with anybody in this case except Twitty.

* * *

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THE COURT: I think that properly belongs in the record.

* * *

Motion to Disregard Evidence

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MR. MURCHISON: Then the defendants respectfully move the Court that the jury be instructed to disregard all the evidence with respect to either two or three stills which the witness Roy Bailey claimed to have discovered on his farm. And I make that motion because there is nothing in this record whatsoever to connect any of these defendants with those two or three stills found in Chester County on Roy Bailey's farm.

THE COURT: The proof is by Mr. Bailey that defendant Clyde Garner approached him in the fall of 1954 for permission to set up a still or stills on his farm, and that he refused to do it, and that a month or six weeks later, somewhere near the first of the year '55, he discovered these stills on his farm, and he went to Mr. Garner about it and had a conversation with him about it, and that the stills were promptly removed, two of them by the sheriff. I think that evidence is properly in the record.

* * *

MR. MURCHISON: Just one second.

Now, if your Honor please, the defendants

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also respectfully move the Court that the jury be instructed to disregard the evidence with regard to the alleged existence of some stills on TVA land, as testified to by Officer Blasingame, — that is, as referred to by Blasingame as being overheard by him in a conversation of the defendant, Clyde Eugene Garner, because, as I recall, no proof that there were ever any such stills up there. I don't recall the proof shows the existence of any such stills up there.

MR. HODGES: Yes, sir, by the witness Lumpkins, just to refresh your memory.

MR. MURCHISON: I don't believe—

Motion to Disregard Evidence

THE COURT: I think there is proof in the record that there were two such stills, — thirty-five sackers, I believe they were referred to, — and the Court thinks that particular evidence has a proper place in the record.

* * *

Motion for Judgments of Acquittal

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MR. MURCHISON: I believe that is all.

I will pass on, then, if Your Honor please, to my final motion. And that is, may it please Your Honor, the defendants, and each of them, respectfully move the Court that there be entered in this case judgments of acquittal as to each of them, first on the ground that there is no evidence, and no evidence has been introduced, — no competent evidence has been introduced showing the existence of the conspiracy described and defined and outlined in the indictment in this case. On the contrary, the evidence which has been introduced upon the trial of this case tends to establish, if anything of a criminal nature, the merely isolated acts on the part of some persons, which may or may not have included the defendants, but, in any event, there is no evidence that these defendants were guilty of the

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conspiracy for which they have been indicted.

Now, that was the first part of it.

And, second, Your Honor, I respectfully submit to the Court that upon the proof that has been introduced in this case, that, as to certain of the defendants, — particularly

Mrs. Garner here, — there has been no substantial evidence that she has been guilty of any conspiracy within the meaning of the law.

* * *

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Now, I also particularly wish to move for a judgment of acquittal as to the defendants Fesmire, Sammy Joe Garner, and Edd John Mayo.

Now, the record here, if it discloses anything, fails to connect them in any conspiracy, as I view it. And Sammy Joe and Edd John Mayo at the most would appear to be merely some employees or hired hands of somebody that—, taking the view

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most favorable that the Government claims. I am talking about the Government's own contentions with respect to those people. Assume that what they say is true, and disregard the defendants' proof on it, — there is nothing here on this record which would support a conspiracy charge against Sammy Joe or Fesmire, Oren Cloud Fesmire, or Edd John Mayo.

And I respectfully submit that they should have a judgment of acquittal entered in their favor, — and all of them. On all the proof here that has been introduced, I think there has been no evidence of a conspiracy on the part of these defendants, — that is, all of them. And we think they are, on the proof which has been introduced on the trial of this case, entitled to a judgment of acquittal.

THE COURT: Well, the motion is overruled.

* * *

On the Charge of the Court

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THE COURT: Come around, then.

(The following occurred at the bench, and out of the presence and hearing of the jury:)

MR. APPLEBY: Let me see, then. I think I remember that, if Your Honor please.

MR. MURCHISON: The Courts have held it was absolutely error if the jury is not informed—.

MR. APPLEBY: Yes, I remember the Court charged it was only a means of bringing the defendant—

THE COURT: Here it is, right here.

MR. MURCHISON: We will note an exception on that, anyway, because I want to get that clear.

THE COURT: State your reasons, then, into the record for your exceptions to the Court's refusal on that special request, if you will. The rules require that, I believe.

MR. MURCHISON: Yes, sir. The basis of our exception is that the jury should be positively instructed that the indictment and its allegations are not evidence of the matters relating thereto, and the fact that we do not believe the previous instructions sufficient to cover this question, in view of the fact

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that the indictment is to be carried by the jury into the jury room.

(Said special request is as follows:)

"Defendant's Request No. 2

Refused — Boyd

"The Court is permitting you to take to the jury room with you the indictment in this case, but you are again instructed that the indictment itself is not evidence of the guilt of the accused persons."

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Charge of Court

THE COURT: Gentlemen of the jury, the indictment in this case, which, as you understand, I am sure, is a means only by which the defendants are brought before this court and this jury for trial, charges the defendants, and each of them, entered into a conspiracy to violate certain Internal Revenue statutes of the United States, and, in pursuance thereof, as a means of carrying out the same, one or more of the defendants committed certain overt acts to effect the objects and purposes of the conspiracy.

The indictment, which is a rather lengthy one, will be furnished you in the jury room for your convenience.

* * *

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Verdicts of Jury

THE FOREMAN: Your Honor, the jury has voted that Clyde Garner is guilty, Audrey Hart Garner guilty, Horace G. Twitty guilty, Sammy Joe Garner, guilty, Oren Cloud Fesmire guilty, Edd John Mayo guilty.

THE COURT: Are they the verdicts of all of your gentlemen?

JURORS: Yes.

THE COURT: So say you all.

Thank you very much, gentlemen.

* * *

744-745

Court — Sentences of Defendants

THE COURT: The Court has a pre-sentence report on Edd Mayo, but has not requested pre-sentence reports with respect to the other defendants.

After a fair and impartial trial, the jury has found each of you guilty except Reves, and he stands before the Court on a plea of guilty, and it now becomes the duty of the Court to pass sentence.

And accordingly, it is the judgment of the Court that the defendant, Clyde Garner, be sentenced to the custody of the Attorney General for a period of three and one-half years, that he be assessed a ten thousand dollar fine.

That the defendant Audrey Garner is sentenced to the custody of the Attorney General for a period of eighteen months, and that she be assessed a five thousand dollar fine.

Sammy Garner, eighteen months.

Twitty, three and a half years.

Fesmire, eighteen months.

Mayo, one year.

Reves, seven months.

Only Clyde Garner and Audrey Garner are assessed fines.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1956.

No. 294

CLYDE EUGENE GARNER, AUDREY HART GARNER,
HORACE G. TWITTY, OREN CLOUD FESMIRE,
SAMMY JOE GARNER, EDD JOHN MAYO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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IN THE

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner and Edd John Mayo, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 13, 1957. The Opinion of the Court of Appeals in this case filed the same day is in the Appendix hereto.

STATEMENT OF JURISDICTION.

The order of the Court of Appeals affirming the judgment of the United States Court for the Western District of Tennessee was entered May 13, 1957. May 30, 1957, the Court of Appeals entered an order allowing the petitioners an additional thirty days to file their petition for a rehearing. Said petition was filed June 17, 1957, and on June 25, 1957, the Court of Appeals entered an order denying the same. This petition, accompanied by a certified transcript of the record, as required by Rule 21 of this Court, is filed with the Clerk within 30 days after entry of the order denying the petition to rehear. The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254 (1), Rules 19, 21, 22 and 23 of this Court, and Rule 37 (c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether the petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which proved not one conspiracy but eight different ones. The evidence showed not only unrelated conspiracies but also isolated acts of criminality or of suspicious character utterly unconnected with the main conspiracy charged. In their execution there was not even a "common key figure."

(2) Whether there was substantial evidence that the petitioners were guilty of the conspiracy alleged in the indictment? Petitioners contend that the evidence did not establish the essence of the offense, to-wit, the unlawful conspiracy, and the only tendency of the proof was to determine the guilt or innocence of the petitioners with respect to a substantial violation, actual or claimed, of the Internal Revenue Laws.

(3) Whether the district Court committed reversible error when in permitting the jury to take the indictment to the jury room with them during the deliberations he did not instruct them as requested by petitioners as follows:

> "The Court is permitting you to take to the jury room with you the indictment in this case, but you are again instructed that the indictment itself is not evidence of the guilt of the accused person."

The substance of the requested instruction was not covered in the general charge to the jury.

STATEMENT OF THE CASE

The record consists of two printed volumes, comprising the appendices to the briefs in the Court of Appeals. The Petitioners' Appendix consists of one volume and is numbered 1a through 137a, and Respondent's Appendix is in one volume numbered 1b through 95b.

On March 26, 1956, a one count indictment was returned in the United States District Court for the Western District of Tennessee, Eastern Division, against Clyde Eugene Garner, his wife, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo, Hood Luther, Henry Laverne Nix, and James George Reves, charging them with engaging in a conspiracy under Title 18, Section 371, U. S. Code Annotated, with respect to the unlawful manufacture, transportation, distillation, possession, et cetera, of intoxicating liquors, in violation of Sections 2803, 5008 (b), 2913, 5632, 2810, 5174, 2833, 5606, 2834, 5216 (a) and 7302, of the Internal Revenue Code of 1939, Title 26, U. S. Code. The indictment alleged the conspiracy began on or about September 1, 1954 and continued up to and including the date of the indictment, to-wit, March 26, 1956 (App. 3a).

The defendants Luther, Nix and Reves, on their pleas of guilty, were sentenced prior to the trial. The trial of the Petitioners began May 30, 1956, and ended on June 1, 1956, with a verdict of guilty as to all six of them. Sentences were as follows: Clyde Eugene Garner three and one-half years imprisonment and a $10,000 fine; Audrey Hart Garner eighteen months imprisonment and a $5,000 fine; Sammy Joe Garner and Oren Cloud Fesmire eighteen months imprisonment each; Horace G. Twitty three and one-half years in prison and Edd John Mayo one year imprisonment (App. 2a).

The Government endeavored to hold all the Petitioners responsible for violations of the Internal Revenue Laws

as to whiskey taking place at four or five distilling sites in three distinct Counties of Tennessee, to-wit, Henderson, Chester and Decatur, and for substantive, but isolated, other offenses and transactions in those three and other Counties in the Western District of Tennessee. No relationship of these ventures to the others was proved. There was no substantial evidence that all of them were part of any general conspiracy.

Petitioners Clyde Garner and Audrey Garner, husband and wife, live on a farm in the "Garnertown" section of Henderson County. On September 8, 1954, Treasury Agents found 63½ gallons of untaxed whiskey 150 yards "back of the Garner residence" (App. 29a). On the same day the officers discovered a partially dismantled still one mile away from the Garner residence on property whose ownership was not proved (App. 48a). In the course of this visit of the agents the Petitioners Horace Twitty and Sammy Joe Garner entered Clyde Garner's yard in a truck which contained a ton of sugar. Sammy Joe Garner had on his person a note signed "Audrey," apparently addressed to some merchant about a sugar purchase (App. 46b). A short while later Petitioners Fesmire and Mayo, respectively, drove an automobile and a truck into the same yard (App. 49b). They found no distillery on property of the defendants Clyde and Audrey Garner, and there was nothing to show that Clyde and Audrey Garner, Sammy Joe Garner, Twitty, Mayo or Fesmire had any connection with the partially dismantled distillery one mile away from the Garner home. The other three defendants named in the indictment, Hood Luther, Henry Nix and James George Reves, were never seen anywhere in Henderson County on any occasion. The court denied the Petitioners' motion to exclude this evidence (App. 130a).

The next transaction involved a delivery of 2,000 pounds of sugar October 12, 1954, by Webb's Grocery of Lexington, Henderson County, Tennessee, to Sammy Joe Garner

and payment therefor by Andrey Garner. Petitioners Twitty and Clyde Garner also received sugar from this store in the fall of 1954 (App. 63a, 64a). There is no proof of still operations involving any of the Petitioners in October, November, or December of 1954.

The jury was permitted to consider the operation of a distillery at Brodie's Landing in Decatur County, Tennessee, many miles from Garnertown, without any evidence whatever that any of the Petitioners had any connection therewith. Overt Act No. 6 alleged in the indictment that "on or about January 20, 1955 on TVA land in Decautur County, Tennessee, co-conspirator Clyde Eugene Garner set up and operated two 2400 gallon still pots . . ." (App. 8a). State Highway Patrolman Blassingame testified that in the latter part of January, 1955, when he casually met Clyde Garner at a point in Chester County, the latter, out of the presence of the other Petitioners and defendants, remarked, jokingly or otherwise, that he had had hard luck in locating two large stills on land he mistakenly understood belonged "to someone else", whereas it developed it was Tennessee Valley Authority land. Blasingame said he **believed** the distillery referred to by Clyde Garner "was supposed to be in Decatur County" (App. 76a, 77a). There was no proof of any distillery on TVA land at any time in January of 1955. Garner made no reference to the identity of other persons, if any, who were interested in said still. The witness could not say Garner referred to any particular point in the vast acreage owned by the Tennessee Valley Authority in that county. The name Brodie's Landing was not mentioned in the conversation. Certainly, these weird utterances of that Petitioner to a uniformed law enforcement officer were not in furtherance of any conspiracy but rather were in its defeat. **Fiswick v. U. S., 329 U. S. 211; Krulewitch v. U. S., 336 U. S. 440.** There is not even any corpus delicti of still operations in Decatur County in January of 1955.

No basis existed for the court's permitting the jury to consider this uncorroborated remark of Clyde Garner against all the absentee petitioners and defendants, none of whom, including Clyde Garner, was shown to have ever been in the vicinity of the TVA reservation in Decatur County. It was nearly four months later, on May 4, 1955, that Officer Lumpkins found two large stills in the section known as **Brodie's landing** on TVA property (App. 41a). The discovery of this distillery is too remote to relate to the remarks of petitioner Clyde Garner in January, and it was error for the trial court to deny the Petitioners request to instruct the jury to disregard the evidence concerning distilleries on TVA land (App. 132a). The jury should not have been permitted to assume that because some of the Petitioners once before might have been involved with Clyde Garner, in the fall of 1954 in any county, that Garner if concerned in any Decatur County distillery in either January or May of 1955 had the assistance or cooperation of any or all of the Petitioners and the other three defendants.

Overt Act No. 7 (App. 8a) charged that on March 15, 1955, the petitioner Fesmire "at his home in Henderson County, Tennessee, possessed 90 gallons of non-taxpaid whiskey." This matter had no rightful place in the prosecution. On that date Revenue Agent White found a distillery in Henderson County "located some quarter of a mile behind the Fesmire house", and after destroying the same found in an outbuilding 20 or 30 feet from Fesmire's house 90 gallons of moonshine whiskey. Some time before the trial Fesmire pleaded guilty to a separate indictment for this possession and was sentenced to imprisonment by the court (App. 70a, 71a, 60b, 92a, 93a). There is nothing to show that this distillery was on the land of Clyde and Mrs. Garner, and no basis existed for holding them and the other Petitioners and defendants responsible for Fesmire's possession of the whiskey. A landlord is

not necessarily responsible for the criminal acts of his tenants. Yet this transaction was allowed to be considered by the jury as an overt act with full authority on their part to use it against all of the Petitioners. During the trial Fesmire testified without contradiction that he, alone, was the owner of this liquor (App. 93a). Again the court erred in refusing to exclude this testimony from the consideration of the jury (131a).

Evidence of another transaction unrelated to any conspiracy or to any of the Petitioners, except Clyde Garner, was detailed by the witness Roy Bailey, a Chester County farmer. He said that in the fall of 1954 Clyde Garner requested permission to put a still on his land which permission was refused; that thirty days later he found three distilleries thereon, and then informed Clyde Garner that if the equipment was his he wanted it moved; that Garner, *mirabile dictu*, advised Bailey to report the stills to the sheriff of Chester County, which the witness did. The Bailey land is 20 miles from the Garner home (App. 80a-83a). No other proof was given about this transaction. The sheriff in question did not testify. This tenuous evidence should have been excluded, because even if it were sufficient to implicate Clyde Garner with the stills there was no basis for inferring that the other Petitioners, and the three defendants who were not on trial, were in conspiracy with Garner. The jury, over the objection of Petitioners' counsel, was permitted to consider it without any limitations whatever against all the parties on trial (App. 131a).

The court instructed the jury that the conspiracy alleged was to violate certain Internal Revenue statutes "in the Counties of Chester, Decatur, and the Garnertown section" (App. 87b). Yet he permitted the jury to consider evidence of the seizure of 30 gallons of illegal whiskey in the home of one John Warren in **Gibson County**, 30 to 35 miles from Garnertown. On April 14,

1955, near Warren's home, Captain Robinson, State Highway Patrol, saw petitioner Twitty and Warren in the latter's automobile, and found in Twitty's car nearby "container prints" and "a wet spot which could have been made by whiskey." The 30 gallon seizure was then made in Warren's home. If these acts showed a conspiracy to possess tax-unpaid whiskey, the conspiracy was limited to Warren and Twitty. There was no evidence of any connection between Warren and the other Petitioners, or that the other Petitioners, and the three defendants not standing trial, even knew Warren. The source of supply of the 30 gallons is still a mystery. A motion to exclude this evidence was overruled (App. 131a).

Proof was given the jury of a distilling venture at Bath Springs, Decatur County, terminating August 13, 1955. The operators Hood Luther, Henry Laverne Nix and James George Reves, who pleaded guilty and did not stand trial, apparently during the time this enterprise was in effect, never left the distillery site which was on the Tennessee River (App. 89a). There was no evidence to connect with that operation, directly or indirectly, the Petitioners Mayo, Mrs. Audrey Garner, Sammie Joe Garner or Fesmire, the latter at that time being confined in a Federal penal institution serving his sentence for the possession of the 90 gallons of whiskey for which he was arrested about March 15, 1955. Mr. and Mrs. Adkins, whose home was near the Bath Springs distillery, testified about conversations and activities of the Petitioners Clyde Garner and Twitty, and Nix, Luther and Reves, at the Adkins home and in the vicinity of the distillery several weeks prior to April 13, 1955. In these conversations not even the names of the absentee Petitioners, to-wit, Mrs. Garner, Fesmire, Mayo and Sammy Garner, were mentioned (App. 5b et seq., 32b et seq.), but these parties were made to answer for what occurred or what was said at Bath Springs according to the court's instructions.

It is obvious the prosecuting attorneys appreciated the lack of interest of the four Petitioners mentioned above in the latter distillery operation. Note that overt act No. 9 in the indictment states that on August 13, 1955, and for several weeks before "co-conspirators Hood Luther, Horace G. Twitty, Clyde Garner, Henry Laverne Nix and James George Reves operated" these Bath Springs stills, etc. (App. 8a). The court erred in not granting Petitioners' motion to instruct the jury to disregard the Bath Springs evidence (App. 130a).

Other evidence was admitted of isolated law violations and extraneous conduct unrelated to the main conspiracy charged, but we believe we have said enough to emphasize the confusion and beclouding of the issues to be found in this "mass prosecution."

At the conclusion of all the proof the court denied the Petitioners' motion for a judgment of acquittal on grounds that no substantial competent evidence had been introduced showing the existence of the conspiracy described in the indictment; that there was no substantial evidence supporting the guilt of the offense charged on the part of the Petitioners, Mr. and Mrs. Garner, Fesmire, Sammy Joe Garner, Edd John Mayo, and Horace Twitty and that the proof introduced did not show guilt of the conspiracy on the part of any of the Petitioners herein (App. 133a, 134a).

THE COURT'S CHARGE TO THE JURY.

Despite trial counsel's motions presenting the question of fatal variance and their endeavors by motions to protect individual Petitioners from the dangers of **"transference of guilt" (Kotteakos v. U. S., 328 U. S. 750)**, resulting from the proof of isolated unlawful transactions involving a minority of the nine named conspirators, and in several instances only one of the named conspirators, the court in his instructions to the jury made inevitable this unjust

"transference of guilt." In the final charge he treated all of these enterprises, distinctive in time, place and personnel, as constituting one conspiracy, time and again using such expressions as "the conspiracy charged in the indictment," and "a conspiracy," and "the conspiracy." And his instructions regarding joint responsibility of conspirators for acts and declarations of the others were based on the premise of one conspiracy charged and but one established. He thus made each defendant responsible for the acts and declarations made by the parties to the separate conspiracies and those of them who might have committed individual offenses, regardless of the absentee Petitioners' connection therewith, their knowledge thereof, or their acquaintance with the participant therein (App. 79b, 84b, 85b, 86b, 87b).

After the court gave the jurors the indictment to take with them to the jury room to consider during their deliberations, he refused to grant Petitioners' request for Special Instructions No. 2, as follows:

> "The court is permitting you to take to the jury room with you the indictment in this case, but you are again instructed that the indictment itself is not evidence of the guilt of the accused persons" (App. 135a).

Nowhere in the instructions to the jury did the court inform them that the indictment itself was not evidence of the guilt of the accused.

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The Court of Appeals has decided questions of Federal law in a manner in conflict with applicable decisions of this Court. The jury was allowed to convict the six Petitioners of conspiracy on evidence of not only one conspiracy but of eight different conspiracies and some spe-

cific violations not shown to be a part of any conspiracy. Thus the action of the Court of Appeals was contrary to the principles established by this Honorable Court in **Kotteakos v. U. S., 328 U. S. 750; Berger v. U. S., 295 U. S. 78;** and **Blumenthal v. U. S., 332 U. S. 539.** The Court of Appeals also upheld the conviction of some of the Petitioners who, as we will hereinafter show, at the most only participated in an overt act or substantive offense not shown to have any knowledge of or the required "stake in the outcome" of any conspiracy, contrary to the rulings of this Court in **Di Re v. U. S., 332 U. S. 581,** and **Falcone v. U. S., 311 U. S. 205.**

Of great prejudice to these Petitioners was the variance between the single conspiracy charged in the indictment, and also assumed as single by the trial court, and the government's proof tending to show not only additional and unrelated conspiracies but isolated acts of criminality or of suspicious character on the part of individual Petitioners and defendants utterly unrelated to the conspiracy charged. Considering the rule making conspirators responsible for the actions and declarations of co-conspirators out of their presence and hearing, even without the knowledge of the absentee conspirators, and the broad instructions of the court to the lay jurors, it is easy to understand the prejudice and dangers naturally resulting from this mass prosecution involving multiple conspiracies and isolated crimes on the part of some of those named in the indictment. Such character of prosecution often results in the conviction of a defendant of the crime charged on proof of another and different offense, which procedure is in violation of the due process provision of our Constitution. **Cole v. Arkansas, 333 U. S. 196; Stewart v. Michigan, 230 U. S. 665; Vann v. U. S. (5th Cir.), 76 Fed. 2d 608.**

This prosecution was so conducted that the Petitioners, who had the right to be informed of the nature and

character of the accusation against them, were unable to present their defenses and were victims of "**transference of guilt**" from one party or parties, over whom they had no control, to themselves. The prejudice resulting from the evidence of these multiple conspiracies and offenses, in some instances, involving only one defendant acting singly and, we say independently in this case, reaches that degree compelling the granting of a new trial under the principles of **Kotteakos v. U. S.**, supra, and **Berger v. U. S.**, supra.

The false assumption throughout this trial that if some three or four persons should act in concert in violating Internal Revenue Laws at some site, say in the month of September, the entire group named in the indictment would individually be responsible for all other distillery and whiskey operations at other times and places if one or more of the first group were involved alone or with strangers therein, even though those not participating in subsequent operations had no knowledge of or the required "stake in the outcome" of the latter ventures.

To uphold these convictions in the face of this prejudicial variance would be to ignore the principles enunciated in **Kotteakos v. U. S.**, supra; **Berger v. U. S.**, supra, and **Blumenthal v. U. S.**, supra. In the **Kotteakos** case, Judge Rutledge declared that the petitioners suffered substantial prejudice from their being convicted of a single conspiracy on evidence proving not one but eight or more different ones of the same sort executed through a "**common key figure.**" Here we do not have a "common key figure." At the trial (App. 121a), and in the Respondent's brief in the Court of Appeals, the petitioners Mr. and Mrs. Clyde Garner were charged as "superiors" of the alleged conspiracy. Yet, Mrs. Garner was not shown to have any guilty connection, by direct or circumstantial evidence, with the enterprises, and Clyde Garner was not involved in a number of them. The most that

can be said against Mrs. Garner is that she is lawfully wedded to a named conspirator. Association by blood or marriage has never been accepted as warranting an inference of guilt. **Henderson v. U. S. (6th Cir.), 202 Fed. 2d 400; Templeton v. U. S., 151 Fed. 2d 706; Lee v. State, 66 Ark. 286.** Also, it has long been held in many courts that a husband and wife alone cannot form an unlawful conspiracy.

In the **Kotteakos** case, numerous defendants made false statements for F. H. A. loans independently of each other **but all through the key defendant Brown,** and there was no question that each conspired with Brown. This Court gave full consideration to the prior decision of **Berger v. U. S., 295 U. S. 78,** wherein one conspiracy had been charged but two proved against three defendants, one of which had two participants, the other had three, and the defendant Katz was common to each. There, it was held that the variance was not such as to affect the substantial rights of the accused due to the unusual circumstances of the case and the precautions taken by the trial judge. In the **Kotteakos** case Justice Rutledge made the following remarks about how the defendants therein were prejudiced by the proof of the multiple and unrelated conspiracies, which we believe are applicable to the full extent in this case:

> "Obviously the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate." 328 U. S. 767.

The trial judge in that case, as did the one in the instant cause, in his instructions treated the evidence as presenting one conspiracy. This Court said:

"Moreover, the effect of the court's misconception extended also to the proof of overt acts. Carrying forward his premise that the jury could find one conspiracy on the evidence, the trial judge further charged that, if the jury found a conspiracy, 'then the acts or the statements of **any** of those whom you so find to be conspirators between the two dates * * * may be considered by you in evidence as against **all** of the defendants whom you so find to be members of **the** conspiracy' (p. 770).

"On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, **but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some**" (p. 771). (Emphasis supplied.)

"**Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.** * * * When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group" (p. 773). (Emphasis supplied.)

"But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. **The dangers for transference of guilt from one to another across the line separating conspiracies,**

subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Section 269 had no purpose to go so far. The line must be drawn somewhere. **Whether or not Berger marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one"** (p. 774). (Emphasis supplied.)

" . . . we disagree with that conclusion and with the ruling that the permeating error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others as shown by this record" (p. 775).

It was said in **Berger v. U. S., 295 U. S. 78, 82:**

"The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial. * * *"

The Court of Appeals in the same **Berger** case, **73 Fed. 2d 278, 280,** referring to the joinder of conspiracies in the proof, said that a question to be considered is:

"How far it throws confusion into the trial and makes it liable to miscarry."

The Government conceded in another case that, if more than one conspiracy is proved on a trial, prejudice results and the question then is as to its degree. **Blumenthal v. U. S., 332 U. S. 539.**

In line with our contentions is **U. S. v. Peoni, 100 Fed. 2d 401 (2nd Cir.),** as follows:

"At times it seemed to be supposed that, once some kind of criminal concert is established, all par-

ties are liable for everything any one of the original participants does, and even for what those do who join later. **Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purposes or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it.**" (Emphasis supplied.)

It seems that the main reason for bringing Mrs. Audrey Garner into the conspiracy is that she is Clyde Garner's wife and had the bank account in her name. Her signing a court appearance bond for Fesmire warrants no inference of guilt (App. 62b). There is nothing unnatural in a landlord, particularly in the South, "bailing out" his tenants. Eliminate the circumstance of Mrs. Garner's giving her check to pay for a large quantity of sugar one or two times and any suspicion of her being connected with a conspiracy vanishes. There is no evidence as to the particular destination of the sugar paid for by her or charged to her in the two stores. Even if she knew that the sugar paid for by her would be probably used in the manufacture of illegal whiskey, under the principles of **Falcone v. U. S., 311 U. S. 205,** she would not be a conspirator just on that showing.

There is no substantial evidence that Petitioner Fesmire was involved in the main conspiracy, or any other conspiracy. He is not shown to have acted jointly with anyone. Whatever his landlords, Mr. and Mrs. Garner, may have done is not chargeable to him. The proof is that at one time he possessed 90 gallons of illicit whiskey and a 40-pound sack of charcoal. This discovery resulted in his arrest and prior sentence. It is stretching things too far to infer, first, that those things were done as a part of a conspiracy, and, second, that the conspirators were the six Petitioners and the other defendants.

All that is shown against Mayo and Sammy Joe Garner is that on an occasion or two they either had in their possession a large quantity of sugar or were in the presence of someone else in possession of such materials. Such facts are insufficient to join one in a conspiracy. See, **Falcone v. U. S.**, supra; **Di Re v. U. S., 332 U. S. 581; Bell v. U. S., 2 Fed. 2d 543; Lewis v. U. S., 219 Fed. 36.** As said in **Linde v. U. S., 13 Fed. 2d 261:**

> "The evidence must convince that the defendants did something other than participate in a substantive offense which was the object of the conspiracy."

Recently, Your Honors announced to prosecuting attorneys that too much reliance must not be put upon the assumed magic resulting from the charge of conspiracy. **Grunewald v. U. S., 353 U. S. 931, 1 L. Ed. 2nd,** decided May 27, 1957:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed."

The Court of Appeals disposed of the foregoing questions in the following paragraph of its Per Curiam Opinion:

> "Numerous other questions are presented by appellants' brief dealing with the admissibility of evidence and motions for a mistrial, which we have considered. The evidence on behalf of the Government was strong and convincing. In our opinion, the rulings complained of did not constitute prejudicial error. Rule 52 (a), Rules of Criminal Procedure."

II.

By its failure to declare erroneous and prejudicial the refusal of the trial court to grant Petitioners' special request No. 2 for instruction that "the indictment itself is not evidence of the guilt of the accused persons," which indictment the jurors took with them to the jury room, the Court of Appeals for the Sixth Circuit has rendered a decision in conflict with a decision of another Court of Appeals on the same matter, and has decided an important question of Federal law which has not been decided, and should be decided by this Court.

This indictment contained the details of some ten overt acts, many involving but one person, and none alleged to have been committed by all defendants (App. 3a). Some were supported by no proof, which was a compelling reason for the granting of this requested instruction.

In the Per Curiam Opinion, it is stated that "the requested instruction embodied a correct principle of criminal law, **and might well have been given.**" What reason, then, was there for not giving the appellants the benefit of this added precaution? It is conceded that when the indictment is taken to the jury room the refusal to instruct the jury as requested by the appellants is reversible error unless the subject is otherwise sufficiently covered in the instructions given. Telling the jury, as the trial judge did, that the indictment "is the means by which the defendants are brought to trial before this court," etc., that the indictment "charges the defendants," that a conspiracy is "charged against them in the indictment," and that there must be proof beyond a reasonable doubt "after a careful consideration of the evidence in this case," that the defendants participated in the conspiracy "charged against them by the Government," is not equivalent to saying that the indictment itself is not evidence of guilt of the accused persons. As was said by Judge Cardozo in **Shepard v. U. S., 290 U. S. 96, 104:**

"It is for ordinary minds, and not for psycho-analysts, that our rules of evidence are framed."

Since, as stated in **Bollenbach v. U. S., 326 U. S. 607**, it cannot be said that "the lay jury will know enough to disregard the judge's bad law if he in fact misguides them", it is likewise illogical to assume the twelve men are of sufficient intellect to replace the omissions of the court's instructions.

In **Schanerman v. U. S., 150 Fed. 2d 941, 944 (10th Cir.)**, the judge, whose refusal to grant a request similar to that of the Petitioners was determined to be reversible error, gave the jurors every precaution that the district judge herein furnished the instant jury. The **Schanerman** judge told the jury that "a defendant in a court room in America is presumed to be innocent until he is found guilty by a jury beyond a reasonable doubt", and "that this presumption is with him at the beginning and all throughout the trial until the jury shall have decided beyond a reasonable doubt that **he is guilty as charged.**" He also told the jurors, "You cannot find the defendant guilty **unless from all the evidence you believe him guilty beyond a reasonable doubt.**" He further said to the jury, "The indictment may go to their room so they can read it and **familiarize themselves with the charge.**"

Observe the strong language of the judge in **Capriola v. U. S., 61 Fed. 2d 5, 8**, who, in sending the indictment to the jury, said:

"The presentation of this indictment is no evidence of their guilt. It is not to be treated by you in any way as raising any kind of presumption or creating any kind of prejudice against the defendants. The indictment is a formal, written accusation of pleading by which the defendants are brought to trial. You must regard this indictment in that light and in no other light."

In view of the unusual circumstances in this case, we feel the rulings complained of constituted prejudicial error.

PRAYER.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this Court for its review and determination on the day certain to be therein named, a full and complete transcript of the record and proceedings in the case on its docket entitled, Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo, Appellants, v. United States of America, Appellee, No. 13,006, to the end that said case may be reviewed and determined by this Court as provided by 28 U. S. C., Sec. 1254 (1), and the applicable Rules promulgated by this Court, governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court, and that Petitioners may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Cause Argued and Submitted.

April 4, 1957—Before: Simons, Chief Judge; Allen and Miller, Circuit Judges.

This cause is argued by Carmack Murchison for appellants and by Warner Hodges for appellee and is submitted to the court.

Judgment.

(Filed May 13, 1957.)

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be and the same are hereby affirmed.

Opinion.

(Filed May 13, 1957.)

No. 13,006.

United States Court of Appeals
For the Sixth Circuit.

Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo, Appellant, v. United States of America, Appellee.	Appeal from the United States District Court for the Western District of Tennessee, Eastern Division.

Decided May 13, 1957.

Before: Simons, Chief Judge; Allen and Miller, Circuit Judges.

Per Curiam. Appellants were convicted under a one-count indictment charging a conspiracy to violate the internal revenue laws of the United States with respect to the manufacture, transportation and sale of distilled spirits.

Appellants contend that it was reversible error for the District Judge to decline to give to the jury the following instruction requested in writing by them: "The Court is permitting you to take to the jury room with you the indictment in this case but you are again instructed that the indictment itself is not evidence of the guilt of the accused persons."

The requested instruction embodied a correct principle of criminal law, and might well have been given. **Capriola v. United States,** 61 F. (2d) 5, 7-8, C. A. 7th, cert. denied, 287 U. S. 671; **Little v. United States,** 73 F. (2d) 861, 864, C. A. 10th. Whether it was reversible error for the trial judge to refuse to give, in addition to his general charge, a specific instruction that the indictment is not to be considered as evidence of the guilt of the accused, when so requested by the defendant, is the question presented.

Appellants rely upon **United States v. Schanerman,** 150 F. (2d) 941, C. A. 3rd, in which refusal to give such a charge was held reversible error. The Court said: "When requested so to do, as in the instant case, the district court, in **clear, unmistakable** words, should have charged the jury that the finding of an indictment is no evidence of the guilt of the accused." (Emphasis added.) However, the Court at the same time recognized the rule with respect to instructions generally that it is not reversible error to refuse to give a requested instruction stating a correct proposition of law essential to the proper determination of an issue, if the requested instruction is given in substance or in effect in the general charge of the court to the jury. The court in that case cited and partly relied upon an earlier case in the same circuit, **Gold v. United States,** 102 F. (2d) 350, 352, C. A. 3rd, and two cases from the Eighth Circuit cited by the court in **Gold v. United States,** supra, namely, **Cooper v. United States,** 9 F. (2d) 216, 226, C. A. 8th, and **Nanfito v. United States,** 20 F. (2d) 376, 378, C. A. 8th. The rulings in these cases seem to be based upon the rule applicable to instructions generally that the court's general charge to the jury contained nothing to the same effect as that required by the defendant.

We have no doubt that if the trial judge permits the indictment to be taken to the jury room, a refusal to instruct the jury that the indictment itself is not evidence of the guilt of the defendant is reversible error unless the

instruction is otherwise sufficiently covered in the instructions given. However, we are of the opinion that the weight of authority is that it is not reversible error to refuse to give a requested specific instruction to that effect if the substance of the requested instruction has been sufficiently covered by the instructions given. **Henderson v. United States,** 218 F. (2d) 14, 18, C. A. 6th; **State v. Sauerbry,** 233 Iowa 1076, 10 N. W. (2d) 544, 546; and cases cited therein; **State v. Di Orio,** 136 N. J. L. 205, 51 A. (2d) 97, 98, reversing 134 N. J. L., 48 A. (2d) 276, which specifically relied upon **United States v. Schanerman,** supra; **Watts v. United States,** 212 F. (2d) 275, 277-278, C. A. 10th; **Sconyers v. United States,** 54 F. (2d) 68, C. A. 5th; **Vandiver v. State** (Ala. App. 1954), 73 So. (2d) 566, cert. denied, 73 So. (2d) 572. See: **Robilio v. United States,** 291 F. (2d) 975, 987, C. A. 6th, cert. denied, 263 U. S. 716; **Kelly v. Commonwealth,** 259 Ky. 770, 772.

In the present case, the district judge, in charging the jury, stated, "the indictment in this case, which, as you understand, I am sure, is a means only by which the defendants are brought before this court and this jury for trial, charges the defendants . . . The indictment, which is a rather lengthy one, will be furnished you in the jury room for your convenience." He later referred to the conspiracy, "charged against them in the indictment," and instructed on the necessity of finding beyond a reasonable doubt "after a careful consideration of the evidence in this case" that the defendants participated in the conspiracy "charged against them by the Government." He carefully and correctly explained the meaning of reasonable doubt. He charged upon the presumption of innocence, and specifically stated that it was incumbent upon the Government before the jury could convict the defendants to establish to the jury's satisfaction beyond a reasonable doubt "that the crime charged in the indict-

ment, and every constituent element thereof, has been committed."

Considering the instructions in their entirety, we think the substance of the requested instruction was covered in the general charge and that the jury understood therefrom that the appellants could not be found guilty until the Government established such guilt beyond a reasonable doubt by evidence produced at the trial without consideration of the indictment itself. **Watts v. United States**, supra, 212 F. (2d) 275, C. A. 10th; **Robilio v. United States**, supra, 291 F. 975, 987, C. A. 6th, cert. denied, 263 U. S. 716.

Numerous other questions are presented by the appellants' brief dealing with the admissibility of evidence and motions for a mistrial, which we have considered. The evidence on behalf of the Government was strong and convincing. In our opinion, the rulings complained of did not constitute prejudicial error. Rule 52 (a), Rules of Criminal Procedure.

The judgments are affirmed.

Order Allowing Appellants Additional Time to File for Rehearing.

(Filed May 30, 1957.)

On application for the Appellants, through their attorneys, for an extension of time within which to file a Petition for Rehearing upon the grounds set forth in said written motion, the United States Attorney consenting thereto;

It Is by the Court Ordered:

That the Appellants be allowed an additional thirty days within which to file a Petition for Rehearing in this Court.

Petition for Rehearing.

(Filed June 17, 1957.)

Copy Furnished With Original Transcript.

Order Denying Rehearing.

(Filed June 25, 1957.)

Appellants' petition for rehearing having been considered by the Court,

It Is Ordered that said petition be denied.

Office - Supreme Court, U.S.
FILED
AUG 16 1957
JOHN T. FEY, Clerk

No. 294

In the Supreme Court of the United States

OCTOBER TERM, 1957

CLYDE EUGENE GARNER, AUDREY HART GARNER, HORACE G. TWITTY, OREN CLOUD FESMIRE, SAMMY JOE GARNER, EDD JOHN MAYO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 24–27) is reported at 244 F. 2d 575.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1957 (Pet. 23). A petition for rehearing was denied on June 25, 1957 (Pet. 28). The petition for a writ of certiorari was filed on July 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence supports the verdicts finding petitioners guilty of a single conspiracy to distill, and deal in, illicit liquor.

2. Whether, after an extensive main body of instructions substantially distinguishing the indictment charge from evidence, the trial judge erred in refusing an instruction that, although the jury was permitted to have the indictment, "* * * you are again instructed" that the indictment is not itself evidence.

STATUTES INVOLVED

The pertinent sections of 18 U. S. C., and of the Internal Revenue Codes of 1939 and 1954, relating to conspiracy and to distilled spirits, are set forth in the Appendix, *infra*, pp. 14–18.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals for the Sixth Circuit (Pet. App. 23) affirming the judgments of the District Court for the Western District of Tennessee, imposed upon the verdicts of a jury (R. 136a)[1] finding petitioners guilty of conspiracy to violate the internal revenue laws relating to distilled spirits.[2] The evidence for the government may be summarized as follows:

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[1] Record designations followed by the letter "a" refer to the printed Appendix filed by petitioners below; designations followed by the letter "b" refer to the printed Appendix filed by the government below.

[2] The sentences imposed were as follows: Clyde Garner, three and one-half years; Audrey Garner, 18 months; Twitty, three and one-half years; Fesmire, 18 months; Sammy Garner, 18 months; and Mayo, one year. Fines of $10,000 and $5,000 were imposed, respectively, on Clyde and Audrey Garner (R. 137a).

Clyde and Audrey Garner owned about four or five hundred acres of farmland in Tennessee, held in Audrey's name (R. 76b). Twitty lived at their house and Sammy Joe Garner, a nephew, across the road (R. 52b, 48a). Fesmire was a tenant of the Garners (61b).

From September to November 1954, 16,000 pounds of sugar were purchased from one retail grocery by Clyde and Audrey Garner and Twitty. One time, Sammy Joe Garner picked up 2,000 pounds for which Audrey Garner later made payment (R. 48a, 62a–64a, 66a, 52b–53b, 57–59b). On occasions, the amounts purchased were larger than the retailer's stock on hand, so that arrangements were made to have the sugar picked up at a jobber's (R. 59b). On one occasion when this was done, Twitty was accompanied by Fesmire (R. 65a; cf. 67a).

In the later part of 1954 and the early part of 1955, Twitty, on three or four occasions, bought five gallon glass jugs in Memphis, Tennessee (R. 27a, 77a, 41b–42b). Clyde Garner accompanied him on at least one such occasion (R. 77a, 66b).

In February 1955, Clyde Garner twice acquired truckloads of 40 pound bags of oak-hickory charcoal in Memphis (R. 25a–26a, 40b–41b). Around March 1955, Twitty, on two or three occasions, brought from 10 to 20 forty-pound bags of charcoal in Lexington, Tennessee (R. 52a–55a, 53b–54b).

On September 8, 1954, federal agents discovered a cache of 63½ gallons of illicit whiskey in a wooded area 150 yards back of Clyde Garner's house (R. 28a–29a, 45a, 42b). A road led from Garner's garden

plot to the site of the cache (R. 42b). On the same day, across the road on property known as Clyde Garner's "old home place," the officers found a distillery, partially dismantled and in process of being moved (R. 43b, 52b). By reason of the amount of ashes and the condition of the still pot, it appeared that the still had been in operation (R. 43b). Fesmire lived in the old home place. The road to the distillery went through his yard and was freshly traveled (R. 48a, 43b–44b).

In October 1954, Sammy Joe Garner bought a 1949 International truck in the presence of Twitty and Fesmire (R. 69a–70a). On October 12, officers looking for Twitty (R. 30a, 34a–35a, 46a, 47b) observed an International truck pull up beside Clyde Garner's house. When the officers drove up behind the truck, Twitty and Sammy Joe Garner ran from the premises (R. 44b–45b). The officers found a ton of sugar in the truck, packed in twenty 100-pound bags (R. 45b). In a shirt which Sammy Garner attempted to hide, there was a note which read "Joe go to John Webb and ask him if Edd May has paid for * * * twenty sacks of S if he says he diden you give him this other note, /s/ Audrey" (R. 45b–46b). The second note read, "Let this boy have 20 I will be in & pay for it Sat. /s/ Audrey Garner" (R. 32a).

On the same day, October 12, 1954, the officers found two stillheads in a vacant house on another tract owned by Clyde and Audrey Garner about a mile from the Garner residence (R. 34a–35a, 47b). The

stillheads had just been made (R. 40a, 47b).[3] On October 19, the officers rechecked the building and were flagged down on the road by Audrey Garner, who walked up to the car juggling some bullets. She said that she owned the house and that she had just placed a lock on the door (R. 40a–41a).

In the fall of 1954, Clyde Garner asked Roy Bailey for permission to put a still on his property, some 10 or 12 miles from Garner's home. Bailey refused. Later, finding three stills on the property, he remonstrated with Garner, who denied that they were his stills and suggested notifying the authorities (R. 80a-83a).

In the latter part of January 1955, Clyde Garner, in a conversation with a member of the Tennessee Highway Patrol, stated that he had been misled by a person claiming to own certain land in Decatur County and had placed two 35-sack pots on the land but had been notified by the Tennessee Valley Authority that it was TVA land (R. 75a–79a, 65b). On May 4, 1955, officers found a 2400 gallon Twitty-type still on TVA land in Decatur County, together with indications of another 2400 gallon still that had been moved out (R. 41a–42a).

In March 1955, officers found and destroyed a still about a quarter of a mile behind Fesmire's residence. In an outbuilding about 20 to 30 feet from the house,

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[3] They were of a type found only along the Alabama line until Twitty moved into the area. Hence, the general reference of law enforcement officers to this type of still as an Alabama-type or Twitty-type still (R. 36a–40a, 46a, 47b).

they found 90 gallons of unstamped whiskey in five-gallon glass jugs, together with a stillhead and bottom. Fesmire stated that he rented three rooms of the house from Clyde Garner, but not the outbuilding, or the remaining rooms of the house. In the additional rooms of the house were found ten forty-pound bags of charcoal, two still pumps, and a tarpaulin. While the officers were at the premises, Mrs. Garner came up (R. 70a–72a, 62b). Fesmire subsequently pleaded guilty to possession of 90 gallons of non-tax-paid whiskey and was sentenced to 11 months and 29 days of imprisonment (R. 49a, 72a). Mrs. Garner was on his appearance bond, showing assets of $25,000 value in two farms in Henderson County, Tennessee (R. 63b).

In June 1955, Clyde Garner purchased more than 300 feet of cypress and poplar (R. 67a–68a). In the same month, Clyde Garner and Luther came to the home of Clarence and Helen Adkins on the Tennessee River near Bath Springs, Decatur County, Tennessee, and inquired as to setting up a still (R. 4b–7b, 20a, 32b). When Adkins refused to have a still set up on his land, the stills were set up about half or three quarters of a mile downstream. A camp for those operating the still was established upstream (R. 21a–23a, 32b). Both sites were inaccessible by road; the men, and materials were transported from the Adkins property by boat (R. 21a, 9b, 32b–34b). Sugar, cypress and poplar lumber, wheat bran, and aluminum were seen transported (R. 21a–22b, 32b). Luther and Twitty were seen with sugar, in 100 pound bags (R. 21a, 32b, 35b). Clyde Garner hauled out a load

of about 50 gallons of whiskey one night in August (R. 24a, 34b).

Twitty and three other men [4] accompanied Garner and Luther on the second visit and stayed from about the last of June into August (R. 20a, 7b–8b). Mrs. Adkins, at the request of Luther, cooked for the men other than Garner and Twitty (R. 9b, 13b–14b). Mrs. Adkins overheard them talk of making whiskey and of Garner's forthcoming visits as constituting pay-day (R. 10b, 17b). Twitty was "in and out" of the area during the three months, two or three times a week, hauling out whiskey in five gallon jugs. Garner was seen on about three occasions (R. 13b, 17b–20b). The still, when found in August 1955, disclosed 6 one-thousand-gallon pots (R. 89a–92a, 72b–74b).

On November 14, 1955, at Lexington, Tennessee, Mayo, with the Garners' check, bought fourteen 100-pound bags of sugar and two 100-pound bags of wheat bran (R. 55a–57a, 55b). The check was written on the wrong bank and, upon inquiry, Audrey Garner changed the name of the bank on the check and signed the revised check (R. 56b–57b). On the same date,[5] officers observed Mayo's truck alongside Clyde Garner's house, loaded with 1,400 pounds of sugar and 200 pounds of wheat bran. They knocked at the house door and called, but despite lights burning inside no one answered. Then Mayo came around the corner of the house, his left hand in his pocket. An officer, knowing

[4] These included Nix and Reves, who with Luther, were named as co-conspirators. All three pleaded guilty prior to trial.

[5] The reference to *October* 14, at R. 50a appears to be in error. Cf. R. 9a.

Mayo to be left-handed, searched him and found a pistol in his pocket. Mayo stated that he had been paid to pick up the sugar in Lexington, Tennessee, and bring it to Garner's house. The officers arrested Mayo and seized the truck (R. 50a–52a).

During the month preceding the instant trial, Clyde Garner came to the witness Clarence Atkins, took him out for a dinner, and plied him with a gallon of beer causing him to get "tight". Garner took him to a lawyer's office where Adkins, who had never learned to read, signed a statement alleging a beating. Adkins had never alleged any beating to Garner or to anyone else. Adkins' wife testified that she had never heard nor seen any physical indications of such an act, or of any threats by the Highway Patrol (R. 27b, 29b–30b, 36b–40b).

Of the petitioners, only Fesmire and Clyde Garner testified. Fesmire stated that, upon arrest in March 1955, he had not told the truth to the officers in denying that the whiskey in the outbuilding was his. He said he had no connection with the still that was discovered at the same time nor with any liquor operations of the remaining defendants. He stated that the charcoal in the house was furnished him by the manager of the "Y" Inn for barbecuing of food for the Inn. (R. 92a–100a, 74b–75b).

Clyde Garner testified that he had had no relationship to any of the liquor transactions. He admitted that he had been convicted of violations of the law on three prior occasions in 1939, 1940, and 1950. He denied that he had ever made any purchase of charcoal, jugs, or sugar, or that he knew

anything of the liquor cache in the rear of his home. He denied that he had ever been at the Adkins' place but admitted that he had induced Adkins to sign a statement for him. He testified that it was Bailey who had discussed putting in a still, rather than he (Garner) suggesting a still to Bailey. He admitted the purchase of lumber but stated that he used it for hog troughs and feeders. He stated that the lock was placed on the outhouse where the stillheads were found because of thefts of fertilizer from it, and that the round wooden discs found there were not stillheads but table tops. He testified that the check given to Mayo was for the purchase of some brood sows. He affirmed that Audrey Garner was his wife and Sammy Joe Garner his nephew, but denied acquaintance or dealings prior to the trial with Nix, Reves, and Luther, and any liquor dealings with Twitty (R. 100a–124a, 76b–77b).

ARGUMENT

1. The facts summarized in the Statement, *supra*, pp. 3–9, refute petitioners' argument that the evidence is insufficient to show their participation in a single conspiracy to violate the federal liquor laws. The record amply supports the conclusion of both courts below that the evidence supports the verdict and the charge of one conspiracy. The Court of Appeals characterized the evidence as "strong and convincing" (Pet. 27). It is clear that Clyde Garner and Twitty were engaged in a large-scale enterprise to operate a number of stills at different times and different places, and that the other petitioners as-

sisted them in various aspects of the operation, knowing that they were part of a larger venture. Their conviction as conspirators was therefore fully justified. *Blumenthal* v. *United States*, 332 U. S. 539, 555–558. "Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence." *Delli Paoli* v. *United States*, 352 U. S. 232, 236, fn. 4, and the cases there cited.

In the case of Fesmire, the fact that he perforce left the conspiracy when he was imprisoned on the substantive charge of March 1955, does not absolve him from liability for his role in the conspiracy up to that time, which was well within the period of limitations. It is, of course, established law that a conspirator may join or leave a conspiracy before its beginning or end. As for Audrey Garner, the evidence points to more than acquiescence in her husband's activities. Not only did she use the wealth in her name in the enterprise, but she herself directed purchases of sugar. These facts, together with her conduct when she informed the officers that she owned and had locked the house in which stillheads were found, justified an inference that she was a knowing and active participant in the conspiracy. Sammy Garner and Mayo were both shown to have engaged in the hauling of sugar under circumstances which showed that they knew they were part of an illegal venture.

2. The court commenced its charge to the jury as follows (R. 79b–80b):

> Gentlemen of the jury, the indictment in this case, which, as you understand, I am sure, is a

means only by which the defendants are brought before this court and this jury for trial, charges the defendants, and each of them, entered into a conspiracy to violate certain Internal Revenue statutes of the United States, and, in pursuance thereof, and as a means of carrying out the same, one or more of the defendants committed certain overt acts to effect the objects and purposes of the conspiracy.

The indictment, which is a rather lengthy one, will be furnished you in the jury room for your convenience.

You will observe from it that the particular offenses against the Internal Revenue laws, which it is alleged the defendants conspired to commit are set out in the indictment. * * *

The court then continued with a summary of the charges and with instructions, *inter alia,* concerning the nature of conspiracy, the government's burden of proof, reasonable doubt, credibility of witnesses, circumstantial and direct evidence, alibi, and identification of persons. In the course of these instructions, the court contrasted the "contention" of the government and the conspiracy "charged" with the jury's function of considering the "evidence" (R. 87b).[6]

[6] The text, here, is as follows (R. 87b):

"Gentlemen of the jury, it is the contention of the Government in this case that on or about September 1, 1954, and continuously thereafter up to and including the date of the indictment herein, the defendants on trial and others not now on trial, entered into and participated a conspiracy * * * and that during the course of such conspiracy one or more of the defendants did commit certain overt acts referred to in the indictment, to effect the object and purposes of the conspiracy, combination and agreement aforesaid.

"If, after a careful consideration of the evidence in this case

Again, the court contrasted a fact "sought to be established" by the government with the requirement, as to circumstantial evidence, that the circumstances "shown in the evidence" must reasonably give rise to an inference of the fact (R. 91b). References to the conspiracy "charged" or "alleged" appear throughout the instructions.

At the close of the instructions, petitioners excepted to the failure to give the following requested instruction. (R. 135a):

> The Court is permitting you to take to the jury room with you the indictment in this case; but you are *again* instructed that the indictment itself is not evidence of the guilt of the accused persons. [Emphasis added.]

Petitioners' argument (Pet. 19–21) that refusal to give this requested instruction constitutes prejudicial error is fully answered by the opinion below (Pet. 27):

> Considering the instructions in their entirety, we think the substance of the requested instruction was covered in the general charge and that the jury understood therefrom that the appellants could not be found guilty until the Government established such guilt beyond a reasonable doubt by evidence produced at the trial without consideration of the indictment itself. *Watts* v. *United States*, *supra*, 212 F. (2d) 275.

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and the instructions as here given you by the Court, you find beyond a reasonable doubt that the defendants, and each of them, entered into and knowingly participated in the conspiracy charged against them by the Government, you will convict the defendants and report to the Court verdicts accordingly."

C. A. 10th; *Robilio* v. *United States*, *supra*, 291 F. 975, 987, C. A. 6th, cert. denied, 263 U. S. 716.[7]

CONCLUSION

The decision of the court below is correct, and no conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

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[7] In *Schanerman* v. *United States*, 150 F. 2d 941 (C. A. 3), cited by petitioners (Pet. 20), the trial judge refused to instruct concerning the duty of the jury to refrain from reliance on the indictment as evidence, and he also rejected the language: "An indictment is merely the means of bringing a defendant to trial" (150 F. 2d at 945). In the instant case, this language was embodied in the instructions: "the indictment in this case, which, as you understand, I am sure, is a means only by which the defendants are brought before this court and this jury for trial" (*supra*, pp. 10–11).

APPENDIX

STATUTES INVOLVED

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *

The Internal Revenue Code of 1939, Sections 2803, 2810, 2833–2834, and 2913 (26 U. S. C., 1952 ed.), and the Internal Revenue Code of 1954, Sections 5008 (b), 5174, 5606, 5216 (a), and 5632 (26 U. S. C., 1952 ed., Supp. II), provide in pertinent part:

> [Section 2803] (a) No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * *
>
> (g) Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding $1,000 or by imprisonment at hard labor not exceeding five years, or by both. * * *
>
> [Section 5008 (b)] No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evi-

dencing the tax or indicating compliance wi h the provisions of this chapter. * * *

* * * * *

[Section 2810] (a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is * * *. Stills and distilling apparatus shall be registered immediately upon their being set up.

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

[Section 5174] (a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up * * *.

(b) Penalty [refers to Section 5601, *infra*].

[Section 2833] (a) Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

[Section 5606] Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined

not more than $5,000 and imprisoned not more than 2 years. * * *

[Section 2834] No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *

* * * * *

[Section 5216] (a) (1) No mash, wort or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax

thereon paid or determined as provided by law. * * *

* * * * * *

(b) Penalty—[refers to Section 5608, *infra*].

[Section 2913] Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

[Section 5632] * * * Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been determined or paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than as provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not more than $5,000, and imprisoned not more than 3 years.

The Internal Revenue Code of 1954, Sections 5601, 5608, 5642, and 7302 (26 U. S. C., 1952 ed., Supp. II), provides in pertinent part:

[Section 5601] * * * Every person having in his possession or custody, or under his con-

trol, any still or distilling apparatus set up which is not registered, as required by section 5174, shall pay a penalty of $500, and shall be fined not more than $1,000, and imprisoned not more than 2 years.

[Section 5608] * * * Every person who violates any provision of section 5216 shall be fined for each offense not more than $5,000, and be imprisoned not more than 2 years. * * *

* * * * *

[Section 5642] Any person who violates any provision of section 5008 (b) * * * shall on conviction be punished by a fine of not more than $1,000, or by imprisonment at hard labor for not more than 5 years, or both. * * *

[Section 7302] It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, * * *. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. * * *

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